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Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 240.

THE DELAWARE INDIANS, RESIDING IN THE CHEROKEE NATION, ET AL, APPELLANTS,

against

THE CHEROKEE NATION, APPELLEES.

Brief on Behalf of the Delaware Indians, Etc., Appellants.

WALTER S. LOGAN,
CHARLES M. DEMOND,
Of Counsel for Appellants.

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This is an appeal from a final decree of the Court of Claims (537), which on February 2, 1903, dismissed the petition filed by the Delaware Indians.

(References to the record refer to *original* paging.)

The opinion of the court below is seen at page 521.

Brief Statement of Facts.

Preliminarily, it is sufficient to state that the Delaware Indians, under authority of an act of Congress of June 8, 1898 (the Curtis act), brought the present suit for the purpose of determining their rights as against the Cherokee Nation, by virtue of an agreement or treaty (5–8), made between the Cherokees and the Delawares, and dated April 8, 1867. The Delawares contended that they, by paying $157,000, obtained as a *tribe* or as individuals, under this agreement, an *aggregate* body of land, which they have selected and improved in various sections of the Cherokee

domain, amounting in all to 157,600 acres. The Delawares *further* contended that they bought from the Cherokees rights of citizenship by making *additional* payments under this agreement (of $121,824.28), and that thereby, in addition to the 157,600 acres of land, they became entitled to share equally with all other Cherokees in the remaining lands and funds of the Cheorokee Nation.

The court below dismissed the bill (it should have fixed the Delawares' rights) upon the theory that the only rights secured to the land in question under this agreement were life interests or life estates in 160 acres of land in each of the 985 Delawares who were on a certain roll of Delawares when the agreement was made, and that as these 985 Delawares from time to time died, their individual interests in said 160 acres lapsed, and the land fell back into the common domain of the Cherokee Nation.

After specifying the errors assigned, the facts will be more fully set forth, and we will take up the various propositions of law on which the appellants rely.

Specification of Errors.

That the learned court below erred in the following particulars:

1. In holding under said Delaware-Cherokee agreement of April 8, 1867, that the only rights specifically purchased by the Delawares to land in the Cherokee Nation were life estates in 160 acres for each of the 985 Delawares enrolled at the time of said agreement, and in holding that upon the death of each of said enrolled Delawares his or her right to said 160 acres lapsed, and said land fell back into the common domain of the Cherokee Nation.

2. In holding that said agreement of April 8, 1867, was not dependent upon and should not be construed in connection with the Cherokee treaty with the United States, dated July 19, 1866, and the Delaware treaty with the United States, dated July 4, 1866.

3. In holding that the Cherokee Nation was not estopped by its previous admissions, made in other litigations, to the effect that the Delawares obtained by purchase exclusive title to said 157,600 acres of land.

4. In holding that extrinsic evidence could not be considered to aid in the interpretation of said Delaware-Cherokee agreement.

5. In holding that the Delawares had no right to attack the action of the Cherokee Nation since the making of said agreement in admitting various persons as citizens, and conferring property rights upon them as such citizens, thus diminishing the share in the lands and funds of the Cherokee Nation to which the Delawares otherwise would be entitled, and for which they had paid.

6. In holding that the Delawares could not object to wrongful acts upon the part of the Cherokee Nation in the misuse of its funds.

7. In not holding that under said agreement of April 8, 1867, that the Cherokees sold to the *Delaware tribe, as a tribe*, or to the individual Delawares, an aggregate body of land, the extent of which was measured by the product of the number of Delawares on said roll, or 985, by 160 acres for each of said Delawares, or 157,600 acres, and in not holding that said sale conferred upon the Delaware tribe, as a tribe, or on said individual Delawares, the highest title known to Indian law, "title by occupancy," to wit, the same title as theretofore had been owned by said Cherokees; and in not holding that said Delawares, as a tribe, or as individuals, acquired such a title by virtue of said agreement (to wit, "title by occupancy") as continued as long as any member of said tribe survived and occupied said land, irrespective of the deaths from time to time of said registered Delawares.

8. In not holding that, inasmuch as at the time of said agreement the Cherokees, as a Nation, had the right of occupancy as communal owners of said land, which they

had theretofore purchased from the United States, that therefore said sale from said Cherokee Nation to said Delaware tribe vested in said tribe the same title, to wit, the right of occupancy of said lands by said Delaware tribe as communal owners, the highest kind of Indian title known to the law.

9. In not granting the various prayers of the petition, and in not finally fixing the rights of the Delawares in the lands and funds of the Cherokee Nation.

10. In dismissing the petition.

The Issues as Raised by the Pleadings.

Before discussing the opinion, the facts, and the law, we desire briefly to set forth the important allegations of the pleadings which are either admitted or denied.

The action was brought pursuant to the *Curtis act*, section 25, and was begun in the fall of 1898.

The petition (2–19) sets forth fully the claims of the Delawares.

After referring to the Curtis act, the Delaware and the Cherokee treaties of 1866, and the agreement of 1867, the petition states that of the 985 enrolled Delawares referred to in the agreement, *212 only are living*, and 773 have died, leaving descendants. The petition shows that under the agreement the Delawares paid $157,600 and thereby secured whatever rights they had in 157,600 acres. That furthermore, when the agreement was made, there were 15,573 Cherokees, and that in order to purchase the additional rights of citizenship mentioned in said agreement, the Delawares paid the additional sum of $121,824.28 into the Cherokee national fund, whereby the Delawares and their descendants became entitled to share with the Cherokees in the national funds and remaining domain of the Nation.

The petition further states that the Delawares have preserved their tribal organization; have been recognized as a tribe; that there are now 920 Delawares residing in the

Cherokee Nation, who have a business committee, and that the question of their title to the lands referred to is in dispute.

All of these allegations are either admitted or are not denied.

The following allegations are controverted: That the Delawares are owners of said land; that they selected it, and have continued to occupy it; that the land should be awarded to them; that they are also entitled to share with all Cherokees in the remaining lands of the Nation; that various persons have illegally been admitted as citizens of the Cherokee Nation; that such persons should not share in the remaining lands and funds of the Nation; that the Cherokees have squandered large amounts of national funds, in which the Delawares had not benefited, and that the Delawares in sharing in the national funds should not be charged with any part of this waste.

We refer to the petition and answer for a fuller statement of the matters in controversy.

The prayer for judgment consists of seven subdivisions (17–19), and is in effect that the court determine petitioners' rights in said lands, and adjudge that the Delaware Indians are entitled to 157,600 acres, which should be transferred to them; that the court determine that the Delawares are also entitled to share in the remaining lands and funds of the Cherokee Nation; and that all persons illegally admitted as citizens be excluded from such share; that the Nation account for improper distribution of its funds; that the share of the Delawares be not diminished by reason of misappropriation of funds, and that the petitioners have such other relief as may be proper.

The Opinion of the Court Below.

The learned court, after considering the act of Congress of June 28, 1898, conferring jurisdiction of the court, cites extracts from said agreement of April 8, 1867 (521–523),

discusses the different theories of the Delawares and the Cherokees respecting the title to said lands, and holds that the title acquired by the Delawares was not a *fee simple* title, but merely individual life estates in the 985 Registered Delawares. The court, however, fails to consider that the Delawares necessarily obtained by said purchase whatever title the Cherokees had. The Cherokees had bought from the United States a title in themselves as a Nation.

The Delawares were purchasing as a *tribe*, not as individuals, and by this purchase there was vested in the tribe the same right of ownership as the Cherokees had. Any other view would result in an absurdity, for many of the Delawares on the register were old and would speedily die, and a purchase of such life estates would be of little value. If, however, the money which was paid, which was the same amount whether the person on the list was old or an infant, was paid by the tribe as a tribe for the benefit of the tribe, then this aggregate body of land became vested in the tribe as communal owners and inured to the benefit of the tribe as long as either any of the registered Delawares lived or as long as any of their descendants might live and occupy the land.

While the court speaks of the absence of words of inheritance, this is of no importance. Probably the Cherokees did not have a fee simple to grant; the intent, however, was to vest the Delaware tribe (not individual Delawares) with all the title the Cherokee Nation as a nation had.

The court cites the case of the Cherokee Nation vs. Journeycake, 155 U. S. 213, as an authority against the position taken by the Delawares. This case will be discussed more fully subsequently. In construing the Delaware-Cherokee agreement the court ignores the terms of the Cherokee treaty and the Delaware treaty of 1866 above mentioned, and declines to consider extrinsic evidence, basing its decision simply upon the face of the agreement itself. We think this was error.

We have no objection to the position taken in the opinion that the Cherokee lands were vested in the Nation in communal ownership, or that the court must consider the agreement in view of the system of land law then in existence among the Indian tribes.

The court says:

> "At the time the agreement was entered into the citizens of the Cherokee Nation held no other right or interest in the land than the right of occupancy as communal owners."

We think this is correct. We think the court should have gone further and stated that this right of occupancy as communal owners was conferred by the agreement upon the Delaware tribe as a tribe.

The court says:

> "After the agreement was executed and went into effect, there were Cherokees by blood having a right of occupancy, and Cherokees by adoption, the Delawares, having a right of occupancy. The only distinction which can be made between them was that the Cherokees bought their right of occupancy from the United States and the Cherokees by adoption (the Delawares) bought their right of occupancy from the Cherokee Nation."

The court says: "And this is a distinction without a difference."

We think the court is mistaken in this last remark.

After the agreement was signed, the 157,600 acres, which represented the aggregate amount of land purchased by the Delaware tribe, whose *extent* merely was measured by the number of registered Delawares multiplied by 160 acres, this land, we say, although situated within the bounds of the Cherokee Nation, and although not in one compact body, was owned by the Delaware tribe as a tribe, and the Delawares then had the same right of occupancy in communal ownership as the Cherokees previously had to this specific land, prior to the making of the agreement.

By this sale the Cherokee national domain, the land of Cherokee Nation owned in communal ownership, was diminished by 157,600 acres, and as to the *ownership* of this the Delawares were an "Imperium in imperio." The remaining lands of the Cherokee Nation, however, still continued to be owned by the Nation in communal ownership with right of occupancy, and all persons who were Cherokees, either by blood or adoption, had equal rights in said remaining lands.

As the Delawares, in addition to purchasing as a tribe 157,600 acres, also, by paying an additional sum of money, purchased citizenship, they, together with the other Cherokees by blood, acquired rights in the remaining lands.

We think this logically follows from what the court has said and what appears upon the face of the agreement.

We can not understand, therefore, how the court arrived at the conclusion that the agreement merely granted life estates measured by the lives of each registered Delaware as an individual with respect to different parcels of 160 acres of land.

If the right in the Delaware tribe of occupancy in communal ownership of these lands is recognized or affirmed, such an interpretation would not be in derogation of the system of law respecting Indian lands; it would be in harmony with this system.

The court below held specifically that the Cherokee Nation had a right to adopt additional citizens, although this might diminish the share to which the Delawares were entitled in the lands and funds of the Nation. The court also held that, assuming that the Cherokees had wasted a large portion of the national funds, yet, nevertheless, this was a political act and should not be investigated by the court.

That the court below was in error in the particulars stated it will be the province of this brief to demonstrate.

The main error in the view taken by the court below is in

regard to the nature of the title acquired. Here are two independent tribes or nations dealing together, granting and securing tribal rights. The great Cherokee Nation was not dealing with 985 individuals. The agreement shows on its face that the Delaware tribe as a tribe was a party. While the court is right in saying that no words of inheritance are attached to the grant, this is immaterial. If the occupancy of the Delawares was tribal and not individual, the grant will continue as to all of the land granted as long as any members of the tribe remain upon the land. If the Cherokees had a mere title in common, limited to their occupancy, then they gave the Delawares all the title that they had, and the Delawares would be and are in the same position as if they had received a grant from the United States for their occupancy.

It is sufficient for our purposes that the Delawares acquired these lands for their occupancy as a tribe. This would be as complete an Indian title as our laws would recognize if they had had the land, even before the time when the sovereignty of the United States attached to it. This was all the title which the Cherokees had to give them, and they at least got this title and still have it.

POINT I.

The Case of the Cherokee Nation Against Journeycake, 155 U. S. 213, When Properly Interpreted Is Not an Authority Which Impairs the Force of the Position Taken by the Delawares.

We think it wise at the outset to discuss this case, as it has been urged as a bar to the relief which is sought.

The agreement of April 8, 1867, referred to *two* distinct matters: *first* to the purchase of lands, as contemplated in the Delaware treaty of 1866, and *second*, to the question of the purchase of citizenship and the right to participate in the remaining lands and funds of the Nation. These two subjects could well have been handled in separate agree-

ments. The fact that they are both in one agreement does not affect their independent character.

In the Journeycake case the question for decision arose under the *second* portion of the agreement with reference to citizenship rights. The question of the purchase of the 157,600 acres of land was not involved.

The decision of the Court of Claims, 28 C. Cls. R. 281, was affirmed. Hence, any expressions in the opinion of this court with respect to issues not involved are not in point, and whatever was within the jurisdiction of the Court of Claims is necessarily the law, as that decision was *affirmed*.

In the Journeycake case the jurisdiction depended upon the act of October 1, 1890 (26 Stats. p. 636), wherein Congress granted leave to bring a suit with respect to the recovery of moneys only. Naturally the court could consider no other question.

Hence the *first* portion of the Delaware agreement in regard to the purchase of lands was not before the court. The petition in the Journeycake case claimed that the Delawares as members of the Cherokee Nation were entitled to share in the proceeds of sales of Cherokee lands, or in the rentals arising from leasing such lands. The demand was for a money judgment. The cross-bill interposed by the Cherokees had also reference to money demands; there was no issue in regard to the ownership of land at all.

Therefore, it can not be urged that any expression of this court concerning the title to 157,600 acres was called for by the issues or can be deemed an adjudication of the present litigation.

It is a well-known rule of law that where the question of res adjudicata arises and the pleadings do not clearly show the question raised, or there is other doubt or ambiguity, the court then is authorized, in order to ascertain the questions raised and decided, to consider the opinions, the decisions, the briefs of counsel, and often, if necessary, to take other extrinsic evidence. The affirmative is upon the

party asserting that a certain matter was necessarily litigated and decided between the same parties or their privies.

Campbell *vs.* Butts, 3 N. Y. 173.
Doty *vs.* Brown, 4 N. Y. 71.
Dunckel *vs.* Wiles, 11 N. Y. 420.
Stowell *vs.* Chamberlain, 60 N. Y. 272.
Dawley *vs.* Brown, 79 N. Y. 398.
Cromwell *vs.* County of Sac, 94 U. S. 351.
Kerr *vs.* Hays, 35 N. Y. 331.
Patrick *vs.* Shaffer, 94 N. Y. 423.
Clemens *vs.* Clemens, 37 N. Y. 73.
Wells *vs.* Compton, 3 Robinson (La.), 171.

A judgment is only conclusive in respect to the grounds necessarily covered by it, and the law and facts necessary to uphold it.

People *vs.* Johnson, 38 N. Y. 63.
Campbell *vs.* Consalus, 25 N. Y. 613.
Woodgate *vs.* Fleet, 44 N. Y. 1.

A judgment is conclusive only as to facts, without the existence and proof of which it could not have been rendered.

Burlen *vs.* Shannon, 99 Mass. 200.

In the case of Lewis *vs.* O. N. & P. Co., 125 N. Y. 341, 348, Judge Peckham, in the Court of Appeals, New York, used the following language:

> "Where a judgment may have proceeded upon either or any of two or more different and distinct facts, the party desiring to avail himself of the judgment as conclusive evidence upon some particular fact must show affirmatively that it went upon that fact, or else the question is open for a new contention."

See, also,

Bell *vs.* Merrifield, 109 N. Y. 202, 211.
Russell *vs.* Place, 94 U. S. 606.
Cromwell *vs.* County of Sac, 94 U. S. 354.

See, also, the opinion of Judge Earle in Zoeller vs. Riley, 100 N. Y. 102, 107:

> "It is sufficient to say that we can not be certain that there was in that action any adjudication condemning that mortgage, and the burden was upon the defendant to establish that fact."

Hence, when the decision is ambiguous, or is claimed to be, extrinsic evidence can be employed to apprise the court of what was actually decided.

Cromwell vs. County of Sac, 94 U. S. 351.
Davis vs. Brown, 94 U. S. 423.
Campbell vs. Rankin, 99 U. S. 261.
W. A. & G. S. P. Co. vs. Sickels, 24 How. (U. S.) 333.
Walter A. Wood vs. Skinner, 139 U. S. 293.
Miles vs. Caldwell, 2 Wallace, 35.
Bell vs. Merrifield, 109 N. Y. 202.

A court can look at the opinion rendered.

Birchhead et al. vs. Brown et al., 5 Sandf. 134.
Kerr vs. Hays, 35 N. Y. 331.
White vs. Madison, 26 N. Y. 117.

The recollection of the judge who rendered the decision can be utilized for this purpose.

Rider et al. vs. Union India Rubber Co., 4 Bosw. 169, 177.

And finally the court has the right to look at the briefs of counsel.

Burthe vs. Denis, 133 U. S. 514, 522.

In the Journeycake case the Court of Claims elaborately discussed the nature of Indian titles, spoke of the agreement of April 8, 1867, as a treaty, and affirmed the right of the Delawares to share in the national funds. The court held that when any distribution of the public domain or its proceeds was made, that the Delawares had a right to share

in it. The opinion referred solely to the *second* portion of the agreement, and the decree merely announced the rule that the Delawares as Cherokee citizens should share in the distribution of Cherokee funds.

The decree provides that in the distribution of proceeds and avails of the public domain or common property of the Nation, that both the Cherokee Nation and the United States are enjoined—

> "from making any discrimination between Cherokee citizens by Cherokee blood or parentage and Cherokee citizens by Delaware blood or parentage, to the injury or prejudice of the latter."

Evidently this decree is res adjudicata on this point. Evidently the court below in the case at bar should have passed upon the rights of the Delawares to the remaining lands and funds of the Cherokee Nation; should have settled the controversy in this respect at least; *should not have dismissed the bill.* It was the object of Congress that the decree of the Court of Claims should in itself specify the rights of the Delawares, and certainly in the foregoing particulars the court should have fixed their rights, even if, as the court did, it passed adversely on their claim to the land in controversy.

If the Journeycake case had passed on all questions, it would not have been necessary for the present suit to have been authorized, for naturally there would have been nothing further left open for discussion.

These being the facts, naturally any expression of the opinion of this court in the Journeycake case which might have reference to the title to land would not be considered as binding.

Furthermore, the decision of this court in the Journeycake case in no way helps the Cherokees. This court said that the Delawares upon allotment would receive at least an aggregate amount equal to that which they had purchased. This is our contention. We can admit, as was stated by this court, that the Delawares did not acquire a fee title; they

did, however, acquire a title by occupancy in common, which for all practical purposes is just as good.

The decision of an appellate court is not to be judged by its opinion, but by the action taken, or by the decree rendered. A decree of affirmance means that to the extent that the court below adjudicated a fact in issue, that fact is affirmed and nothing more. The rules with respect to dicta are well settled, and this court will enforce them even with respect to its own previous adjudications.

> Cohens *vs.* Virginia, 6 Wheat. 399, opinion by Chief Justice Marshall.

In U. S. *vs.* Joseph, 94 U. S. 614, where the question arose as to what were Indian tribes and as to what was the tenure of certain lands, this court declined to pass on the question of *citizenship* which was not necessarily involved.

Conversely, as the Journeycake case involved the question of citizenship, this court did not pass upon a question not involved, namely, *the title to lands*.

See also on the same subject:

> Carroll *vs.* Carroll's Lessee, 16 How. 286.
>
> Pollock *vs.* Farmers' Loan and Trust Co., 157 U. S. 429–654.

If this court's opinion in the Journeycake case is to be referred to at all, it is evident that portions of it are undoubtedly in accord with the appellants' contention. The court refers to the Delaware-Cherokee agreement as one for the *purchase* of homes and for a *sale* of lands; that under this purchase their estate continued to be communal, but *not in common with the Cherokees*, and that in any allotments this *aggregate* body of land was to be allotted exclusively to the Delawares.

This is our contention: that the Delaware tribe purchased lands in communal ownership for their occupancy, thus carving out of the Cherokee domain a body of lands held by the Delaware tribe in communal ownership, in which the Cherokees had no interest.

Evidently this court understood that the Delawares could occupy until allotment and that afterwards all provisions against transfer were withdrawn and that the Delawares would then own the land in severalty. This court says that the agreement *excluded the Cherokees from any right of property in the Delaware lands*, and that by implication the Delawares were excluded from the lands of the Cherokees *unless there was a provision to the contrary.*

This is very important and is the very point of the whole decision of this court. There *was* a provision to the contrary under which the Delawares got *in addition* rights of property in the balance of the public domain and the public funds.

Evidently the whole question is an open one and we think that this court, upon careful examination, will coincide with the views of the Delawares, especially as the Cherokees in the Journeycake litigation took the unqualified position that the *Delawares were the absolute owners of their lands, free from any control or interference.*

Can a litigant, even though a nation, take inconsistent positions in different litigations? We think this is not to be tolerated.

POINT II.

The Decree Below Must be Reversed in Any Event Because the Court Did Not Exercise Its Jurisdiction and Power of "Determining the Rights of Said Delaware Indians in and to the Lands and Funds of Said (Cherokee) Nation". The Court Merely Dismissed the Petition, Leaving the Delawares no Better Off Than They Were Before the Passage of the Curtis Act.

The jurisdiction of this court to try the issues raised in the pleadings and determine the rights of the parties thereunder is conferred by the last sentence in section 25 of the act of June 28, 1898 (30th United States Statutes at Large, page 495), which provides:

"That the Delaware Indians residing in the Chero-

> kee Nation are hereby authorized and empowered to bring suit in the Court of Claims of the United States, within sixty days after the passage of this act, against the Cherokee Nation, for the purpose of determining the rights of said Delaware Indians in and to the lands and funds of said Nation under their contract and agreement with the Cherokee Nation dated April eighth, eighteen hundred and sixty-seven; or the Cherokee Nation may bring a like suit against said Delaware Indians; and jurisdiction is conferred on said court to adjudicate and fully determine the same, with right of appeal to either party to the Supreme Court of the United States."

The object of the suit brought and of the jurisdiction conferred on the courts to try such suit is clearly expressed in the foregoing extract from the law as being—

> "for the purpose of determining the rights of said Delaware Indians in and to the lands and funds of said Nation under their contract and agreement with the Cherokee Nation dated April 8, 1867."

It is evident that the court below should have determined, and this court must determine by a decree, just what are the rights of the Delawares to the lands and funds of the Cherokee Nation. Such a determination can not be had merely by dismissing the petition. Some affirmative action should have been taken. The court below and this court have all powers in law and in equity to determine the questions relating to the reciprocal rights of the Delawares and the Cherokees; not only the title to the 157,600 acres, but also the title of the Delawares to, or their rights in the national lands generally, as well as the national funds of the Cherokees. The question is what lands and what funds are the property of the Delawares, and in what proportion shall they share? To ascertain these facts this court has all necessary power to issue process or to take evidence, if more is needed.

We do not understand that the jurisdiction of this court to do these things is now questioned.

It is quite evident, therefore, that the court below did not exercise its jurisdiction as it should have done. It is impossible, upon examining the decree below, to ascertain what specific lands the Delawares are entitled to, either as a tribe or as individuals, or the specific lands to which the 212 living registered Delawares are entitled, or the specific lands which the remaining Delawares should get. There is no provision showing the amount of land in the Cherokee Nation by acres, or the amount of the Cherokee funds or the proportion in which the Delawares shall share therein. By the dismissal of the petition, the Delawares are no better off, so far as certainty is concerned, than they were before the passage of the Curtis act in 1898.

This enabling statute authorized the bringing of the suit and required the court to make a specific determination. The effect of the enabling act was to take away from every other department of the Government and every other tribunal the question of determination of the respective rights of the Delawares and Cherokees. The enabling act vested such determination entirely in the court below and in this court.

Notwithstanding this, the Court of Claims, instead of making that determination, simply dismissed the petition and left the Delawares as they stood at the beginning.

It is quite evident that even an admission of some rights of the Delawares in the *opinion* below is not a determination, and it was the duty of the court below to determine all the rights of the Delawares, even though some of them were not controverted. As the case stands at present the dismissal of the petition leaves the Delawares without any rights. The Executive Department of the Government can go on and distribute the lands and property in controversy in utter disregard of the rights of the Delawares, for the reason that the only tribunal which has the power to determine them has dismissed the petition so that no determination can be had. If the Secretary of the Interior now dis-

tributes these lands and this property and leaves out the Delawares altogether, they have no *judgment* to which they can appeal for protection.

It therefore remains for this court to do what the Court of Claims refused to do, and to reverse that determination and to determine itself all of the respective rights of the Delawares and the Cherokees, and to embody that determination in the form of a *decree* which will be the basis of the rights and claims of the Delawares before the executive departments of the Government. This court must do this, whether on the general questions involved it agrees or disagrees with the opinion of the Court of Claims.

That opinion is in no sense a decree, is binding upon no one, and however strong it may be in favor of the Delawares upon certain points, it avails them nothing, for there is no decree based upon it. In fact, a dismissal of the petition would seem to be an adjudication *that the Delawares have none of the rights which are referred to in the pleadings.*

It can be contended that the effect of the dismissal of the petition is to give at the most to each present living Delaware—whether one of the original registered Delawares or not—merely the right of a simple Cherokee citizen and nothing more, and that the $157,600 was paid for nothing.

Even the surviving 212 registered Delawares get nothing more, under the judgment of the Court of Claims, than a simple Cherokee gets. The dismissal of the petition leaves them with no rights which they can claim, and leaves the Delawares generally with no rights that they can claim, except at most the simple rights of a Cherokee citizen. It might be contended that the Delawares can not even claim this, because, although they allege that they had rights of citizenship, and although this was *not controverted*, yet, nevertheless, the *whole petition* was dismissed upon the merits.

This being a decree in equity, this court has power to make its own decree and settle the whole subject-matter.

The statute is a remedial one and should be liberally con-

strued, in view of all the surrounding circumstances, the evil which existed and the remedy needed.

Aldridge *vs.* Williams, 3 How. 9.
United States *vs.* Buchannan, 9 Feb. Rep. 689.

If the opinion of the Court of Claims is *sustained*, yet, nevertheless, there should be a decree specifying the location of the lands which the 212 living registered Delawares must receive, and also specifying the location of the other lands which the remaining Delawares receive as Cherokee citizens, and then, too, the decree should specify the amount of the Cherokee national funds and the precise proportion in which all the Delawares share in that fund, and whether they share as individuals or as a tribe.

There was abundance of evidence in the record to enable the court to determine these facts. Full and specific lists of the 157,600 acres of land were filed with the court below to show the portion of the Cherokee domain appropriated by the Delawares and giving their names.

Should this court *disagree* with the court below, it is of course necessary that some decree be passed specifying, first, the location of the 157,600 acres by definite descriptions; second, the location of the additional land owned by the Delawares as a tribe or individuals, and third, the amount of the Cherokee funds and the proportion in which the Delawares as a tribe or individuals must share therein.

In any event the decree of the court below was wrong.

The fact that the Delawares *must* have a *judgment* which specifically defines their rights, and *also* determines the *amount* of land they are to have, with its *specific* boundaries, is *emphasized* when we consider the terms of the so-called Cherokee allotment act, section 23, approved July 1, 1902.

This section of this act reads as follows (the italics being ours):

> "SEC. 23. All Delaware Indians who are members of the Cherokee Nation shall *take lands* and *share in*

the funds of the tribe, as their rights may be determined by the judgment of the Court of Claims, or by the Supreme Court if appealed, in the suit instituted therein by the Delawares against the Cherokee Nation, and now pending; but if said suit be not determined before said commission is ready to begin the allotment of lands of the tribe as herein provided, the commission shall cause to be *segregated* one hundred and fifty-seven thousand six hundred acres of land, including lands which have been selected and occupied by Delawares in conformity to the provisions of their agreement with the Cherokees dated April eighth, eighteen hundred and sixty-seven, such lands so to remain, *subject to disposition according to such judgment as may be rendered in said cause;* and said commission shall thereupon proceed to the allotment of the remaining lands of the tribe as aforesaid. *Said commission shall, when final judgment is rendered, allot lands to such Delawares in conformity to the terms of the judgment and their individual rights thereunder.* Nothing in this act shall in any manner impair the rights of either party to said contract as the same may be finally determined by the court, or shall interfere with the holdings of the Delawares under their contract with the Cherokees of April eighth, eighteen hundred and sixty-seven, *until their rights under said contract are determined by the courts in their suit now pending against the Cherokees,* and said suit shall be advanced on the dockets of said courts and determined at the earliest time practicable."

When this act was passed the present suit had *not* been decided by the Court of Claims. Its opinion was not rendered until February 2, 1903.

The decree of the Court of Claims, dismissing the petition, evidently was in *disregard not only* of the Curtis act, section 25, but also section 23 of the Cherokee allotment act.

It was clearly intended by Congress that the extent of the rights of the Delawares should be *specified in* and adjudged by the decree. They get such rights only as are thus determined Section 23 of the Cherokee allotment act provides that the

share they take in the Cherokee lands and funds is to be "determined by the judgment." When the lands are segregated they are to be "subject to disposition according to *such* judgment as may be rendered in said cause." The Dawes Commission is instructed to allot the disputed lands to the Delawares "in conformity to the terms of the judgment and their individual rights thereunder."

But the Delawares have *no rights at all* according to the judgment below, although the *opinion* concedes certain of their rights to lands and funds, and although certain of their rights as stated in their petition are *not denied* by the answer, the court ignoring these facts took away every right of theirs by this dismissal.

The Dawes Commission now, according to the present decree, can logically claim that the segregated lands should be allotted *not at all* to the *Delawares*, who spent $1,000,000 in improving them, but to members of the Cherokee Nation generally. Not even the rights of the *Registered* Delawares are preserved, though the opinion below concedes these to a limited extent.

This Cherokee allotment act, as well as the Curtis act, were the laws governing the courts when the Court of Claims made its decision. It is very strange, therefore, that the decree did not at least establish and define the rights of the Delawares as conceded in the pleadings and as found by the court.

What judgment can the Delawares point to for protection when the Dawes Commission attempts to allot these segregated lands?

They can point to *no such judgment*, for there is none, and the fruit of the present litigation seems to be that the court has decided that they have *no* rights of *any* kind.

Evidently, therefore, the decree below *must be reversed*, and this court should make its *own decree*, specifying the rights of the Delawares in the lands and funds in controversy. Section 23 of the Cherokee allotment act states that the

rights of the Delawares when the case is appealed shall be ACCORDING TO THE JUDGMENT OF THE "SUPREME COURT."

POINT III.

The Delaware-Cherokee Agreement of April 8, 1867, Must Be Read and Interpreted in the Light of the Cherokee Treaty of July 19, 1866 (14 Stats. 799), and the Delaware Treaty of July 4, 1866 (14 Stats. 793), Both of Which Are Recited and Referred to in Said Agreement, and Both of Which Contemplate the Sale of the Disputed Lands.

The conditions existing when the Curtis act was passed are important. The court should consider the history of the Government's dealings with the Indian tribes, as found in existing treaties and statutes, especially those of 1866 and 1867.

Just after the close of the war the Government began its policy of gathering the Indians in the Indian Territory and of removing tribes thereto, so as to secure for white settlers large areas of valuable lands. The court will remember as a result of various councils with tribes then on the southwestern frontier, treaties were made in 1866, among them a treaty of July 4, 1866, with the Delawares (14 Stats. 793) and a treaty of July 19, 1866, with the Cherokees (14 Stats. 799).

The important provisions of these treaties are set forth below.

From an examination of them in connection with the said agreement, it will appear that the said Cherokee treaty provided for the *sale* of the Cherokee lands to other Indian tribes, and for the settlement of tribes within the nation either as a part of the nation or otherwise.

The Cherokee treaty provided for just what was subsequently done under the Delaware-Cherokee agreement,

and that agreement must be read in the light of the Cherokee treaty.

Furthermore, the treaty with the Delawares provided for the buying for them of land somewhere—land which they should own. That is, the treaty provided for doing for the Delawares just what was done for them by this Delaware-Cherokee agreement, and such agreement must necessarily also be read in the light of the Delaware treaty.

In the said treaty with the Delawares, the following, applicable to this litigation, appears:

1. Delaware Treaty.

"Whereas Congress has by law made it the duty of the President of the United States to provide by treaty for the removal of the Indian tribes from the State of Kansas; and

"Whereas the Delaware Indians have expressed a wish to remove from their present reservation in said State to the Indian country located between the States of Kansas and Texas; and

"Whereas the United States have, by treaties, negotiated with the Choctaws and Chickasaws, with the Creeks and with the Seminoles, Indian tribes residing in said Indian country, acquired the right to locate other Indian tribes within the limits of the same.

. . . . . .

"Article 4. The United States agree to sell to the said Delaware Indians a tract of land ceded to the Government by the Choctaws and Chickasaws, the Creeks or the Seminoles, or which may be ceded by the Cherokees in the Indian country, to be selected by the Delawares in one body in as compact a form as practicable, so as to contain timber, water, agricultural lands, to contain in the aggregate, if the said Delaware Indians shall so desire, a quantity equal to one hundred and sixty (160) acres for each man, woman, and child who shall remove to said country, at the price per acre paid by the United States for the said lands, to be paid

for by the Delawares out of the proceeds of sales of lands in Kansas, heretofore provided for. The said tract of country shall be set off with clearly and permanently marked boundaries by the United States; and also surveyed as public lands are surveyed, when the Delaware council shall so request, when the same may, in whole or in part, be allotted by said council to each member of said tribe residing in said country, said allotment being subject to the approval of the Secretary of the Interior.

"Article 5. The United States guarantee to the said Delawares peaceable possession of their new home herein provided to be selected for them in the Indian country, and protection from hostile Indians and internal strife and civil war, and a full and just participation in any general council or territorial government that may be established for the nations and tribes residing in said Indian country.

. . . . . .

"Article 11. The Delawares acknowledge their dependence upon the United States, and again renew their pledges of devotion to the Government thereof, and ask its protection, and the United States agree to protect, preserve, and defend them in all their just rights.

. . . . . .

"Article 15. It is also agreed by the contracting parties that nothing contained in this treaty shall be so construed as to require the Delawares to remove from their present homes until after they shall have selected and received title to lands for new homes elsewhere."

. . . . . .

In the said Cherokee treaty of July 19, 1866, provision was made for the settlement of friendly tribes of Indians on lands within the Cherokee Nation, as follows:

2. Cherokee Treaty.

"Article 15. The United States may settle any civilized Indians, friendly with the Cherokees and adjacent tribes, within the Cherokee country, on unoccupied

lands east of 96°, on such terms as may be agreed upon by any such tribe and the Cherokees, subject to the approval of the President of the United States, which shall be consistent with the following provisions, viz: Should any such tribe or band of Indians settling in said country abandon their tribal organization, there being first paid into the Cherokee national fund a sum of money which shall sustain the same proportion to the then existing national fund that the number of Indians sustain to the whole number of Cherokees then residing in the Cherokee country, they shall be incorporated into and ever after remain a part of the Cherokee Nation, on equal terms in every respect with native citizens. And should any such tribe, thus settling in said country, decide to preserve their tribal organizations, and to maintain their tribal laws, customs, and usages, not inconsistent with the constitution and laws of the Cherokee Nation, they shall have a district of country set off for their use by metes and bounds equal to one hundred and sixty acres, if they should so decide, for each man, woman, and child of said tribe, and shall pay for the same into the national fund such price as may be agreed upon by them and the Cherokee Nation, subject to the approval of the President of the United States, and in cases of disagreement the price to be fixed by the President.

"And the said tribe thus settled shall also pay into the national fund a sum of money, to be agreed on by the respective parties, not greater in proportion to the whole existing national fund and the probable proceeds of the lands herein ceded or authorized to be ceded or sold than their numbers bear to the whole number of Cherokees then residing in said country, and thence afterwards they shall enjoy all the rights of native Cherokees. But no Indians who have no tribal organizations, or who shall determine to abandon their tribal organizations, shall be permitted to settle east of the 96° of longitude without the consent of the Cherokee national council, or a delegation duly appointed by it, being first obtained. And no Indians who

have and determine to preserve their tribal organizations shall be permitted to settle, as herein provided, east of the 96° of longitude without such consent being first obtained, unless the President of the United States, after a full hearing of the objections offered by said council or delegation to such settlement, shall determine that the objections are insufficient, in which case he may authorize the settlement of such tribe east of the 96° of longitude."

. . . . . .

3. Delaware-Cherokee Treaty.

In furtherance of the policy of the Government and the agreements contained in the Delaware treaty of 1866, as above quoted, and under the right acquired by the United States under article 15 of the Cherokee treaty, also above quoted, the Delaware Indians entered into an agreement with the Cherokees, as set forth in paragraph 4 of the complainants' petition, by which arrangements were made for the Delawares to remove to and settle in the Cherokee Nation east of the 96 meridian of longitude. This agreement was approved by the Secretary of the Interior and the President, and was therefore indorsed by the United States, standing in the relation of guardian to both contracting parties. The rights of property obtained by the Delawares under this agreement as claimed by them and admitted until recent years by the Cherokees were:

First. Lands in the Cherokee Nation purchased at the price of $1 per acre to the extent of 160 acres for each Delaware whose name appeared on a certain register made February 18, 1867, by the Delaware agent in Kansas, and then on file in the office of the Commissioner of Indian Affairs (268–280). This was a list of Delawares who elected to remove to the Indian country, and for such other persons as might be added to that list with the consent of the Delaware council (the same being Delawares) within one month after the signing of said agreement. These lands were to be

selected by the Delawares in any part of the Cherokee Nation east of said 96th meridian not conflicting with the selections of other persons already in possession. The said register embraced the names of 985 Delawares.

Second. Citizenship in the Cherokee Nation purchased by the Delawares, including the right to participate in the other communal property in the Cherokee Nation in the ratio of 1 Delaware to 13.78 Cherokee citizens.

Third. The admission of all descendants of registered Delawares, born after the agreement, to rights of citizenship in the Cherokee Nation, including the right to participate per capita with the other Cherokee citizens in any division or distribution of the communal property of the Cherekee Nation.

4. THE DELAWARES ACQUIRED TRIBAL RIGHTS.

It Should be Observed That This Agreement of April 8, 1867, at the Outset (5) Refers to Said 15th Article of the Cherokee Treaty and the Said Delaware Treaty, and Naturally in Construing the Agreement it Must be Assumed That the Agreement Was Made by Virtue of Such Treaties and to Carry Out the Policy Indicated in Them.

On the subject of the purchase of lands the agreement states that the Cherokees—

> "agree to sell to the DELAWARES for their OCCUPANCY a quantity of land . . . *in the aggregate* equal to 160 acres for each individual of the Delaware *tribe*"

upon the said register (5).

This is not a sale to individuals but a sale to the Delaware tribe of title by occupancy in common. This is not a sale of separate tracts of 160 acres each, but of an aggregate

quantity of land measured by the number of persons on the register at the rate of 160 acres each.

The agreement provides—

> "in case the Cherokee lands shall hereafter be allotted among the members of said nation, it is agreed that the *aggregate* amount of land herein provided for the Delawares (the tribe and not individuals) to include their improvements . . . shall be guaranteed to each Delaware incorporated by these articles into the Cherokee Nation" (5).

This is a guarantee, not of specific lots, but of an aggregate body of land.

Restrictions upon alienation were set forth for the reason that no Indian was allowed to transfer his holding to outsiders, the lands being common property (6).

The agreement provides that the tribe as a tribe shall pay $1 an acre, according to this basis, for all land taken. This was a tribal payment made to secure a joint ownership of an aggregate body of land (6).

Thereafter as an independent matter (6) the Delawares agreed to pay a separate sum of money based upon the relative value of national funds and number of Delawares and Cherokees, for the purpose of getting something *additional*, namely, citizenship, and the right to share in the additional lands and funds of the nation.

This payment was likewise a joint payment by the tribe from its tribal funds and secured tribal rights.

Finally, the descendants of such registered Delawares were granted also rights of citizenship (7).

It is quite evident, then, that the only function of the registered list was first as a measure of the quantity of land which the tribe should secure by an appropriation of tribal funds; second, as a census report, which would fix for the time being persons who were the existing members of the Delaware tribe, the persons who then become Cherokee

citizens, and the persons whose descendants should be deemed to be thereafter Cherokee citizens.

It was essential to know how many members of the tribe then existed, because upon their number depended the quantity of land which the tribe should get. Under the second portion of the agreement it was likewise essential to know how many persons might become citizens, and *under the last portion of the agreement it was essential to know how many persons were entitled to consider that their descendants should become, upon birth, citizens of the Cherokee Nation.*

The list does not indicate that the Cherokee Nation made separate contracts for the sale of land or life estates with each of the registered Delawares. This would be absurd as nation was acting with nation. The list was only useful or proper for the foregoing reasons.

As we have shown, the Delaware-Cherokee agreement provides for two things, citizenship and for a sale of land at a definite price.

Land means land, not a life estate in land. As will be seen, some Delawares were dead when the title passed, so that a life estate was valueless; some were fast approaching death, so that a life estate was of little value.

Valuation to land is more or less fixed. There is no valuation to a life estate, the valuation depending altogether upon the life involved. The evidence shows that $1 an acre was the full value of the land; but this price would have been excessive as the price for a life estate merely. The evidence shows also what both parties had in contemplation was land in the ordinary acceptance of the term, not life estates in land.

Hence, the Court of Claims was clearly wrong in holding that what the Delawares acquired was simply life estates in the land for the living Registered Delawares. Our claim is that the Delawares took what title the Cherokees had in the 157,600 acres. The title of the Cherokees was not an absolute indefeasible estate in fee under the deed by which they

held their title. There was a reversion to the United States in case the Cherokees moved away, and they could not sell without the consent of the United States. The same limitation of course applies to the Delawares' title. This is what the words "for their occupancy" mean. The Cherokee title was held "for their occupancy;" that is, the Cherokees must occupy the land and must not sell it, and the expression "for their occupancy" in the Delaware-Cherokee agreement means the same thing with respect to the Delaware lands; that is, the Cherokees were limiting the Delawares by the same limitation, and no other, under which they themselves held their title, and it is our claim that the Delawares took as a tribe and preserved their tribal organization.

This Interpretation (Title in the Delaware Tribe as a Tribe) Is, However, Not Necessary for our Recovery.

The Cherokee Nation necessarily sold and finally parted with whatever title it had to the lands in question, and it makes no difference whether the Delawares acquired their title as a tribe or whether or not the title vested in the 985 Delawares as individuals.

If the Delawares took as individuals, we claim that they took an inheritable title, and that this amounted to the same thing as though they took it as a tribe. If the tribe took the title, then the tribe will divide the lands among themselves; if individuals took the title, then they and their heirs and descendants are entitled to these lands now.

Even if the construction of the agreement is that the 985 Delawares took a title in no land, but were simply guaranteed 160 acres apiece upon a division, yet they still would be entitled to recover, for *there are now more living Delawares than would take up the whole 157,600 acres at 160 acres apiece.*

The construction of the agreement limiting the 160 acres to each of the Delawares now living who were upon the old register would be absurd. We can not contemplate that

these Delawares in 1867 were so selfish as to provide beyond peradventure that they themselves should have 160 acres apiece without making similar provision for their descendants. The one thing that the Indian is noted for is his loyalty to the next generation, to those who are to come after him. No Indian was ever known to betray his race or his descendants for personal profit to himself. To claim that the Delawares were making this bargain which has been called a sharp bargain, without providing that their descendants might participate in it in any degree, would be the height of absurdity. The money which paid for the 157,600 acres was tribal money. The Delawares certainly would not, nor would the United States Government have allowed them to do so if they would, have used tribal money to procure an advantage for the living members of the tribe, which the members who were to come after them could not share in.

If it be said that the members subsequently born were to have simply the rights of Cherokees it does not help the argument in any way. The Delawares were providing for something more than simple Cherokee rights and were *paying* for something more. They bought Cherokee rights by the last provisions of the agreement. By the first provisions they paid $157,600 for something in addition to simple Cherokee rights—either the land itself or for some greater rights in the land than the mere Cherokee citizen had. It can not be presumed that they were securing these additional rights for their own benefit and were deliberately excluding their children from participating in them.

It therefore seems clear:

1. That the Cherokees parted with all their title to the disputed lands.

2. That the Delawares took these lands as a tribe, free from reversion in the Cherokees; or

3. Took the land as individuals, with rights of inheritance in their issue; or

4. Were guaranteed that upon an allotment there should be divided among the Delawares at least 160 acres for at least 985 Delawares, and as there are now more than this number of Delawares, they certainly get the 157,600 acres.

If the individual Delawares took title, the 212 registered Delawares now living take as grantees, and the remaining Delawares take as heirs of the deceased registered Delawares.

The foregoing are some of the facts and a portion of the history of the Delawares which caused Congress to pass the enabling act.

It is apparent from a consideration of the said treaties and the said agreement that the Delawares secured a title to these lands which can never revert to the Cherokees, in addition to securing rights of citizenship and what grows therefrom.

We have stated in this point somewhat in full our construction of the said treaties and said agreement, and a general synopsis of the argument (which will be referred to in the succeeding points somewhat more in detail), in order that the court may at the outset be impressed with the phraseology of these documents, and may understand what are the real points in controversy.

POINT IV.

The Complainants are Properly in Court.

We do not understand that the point will be raised as to any defect of parties plaintiff, or as to the capacity of the plaintiffs to sue. However, a few words on this subject may be important. The statute, section 25, of the Curtis act authorizes "The Delaware Indians residing in the Cherokee Nation" to sue. The *record* will show that they consisted of men, women, and children, young and old, some 1,080 in all, only 212 of whom are living Registered Delawares.

Among the plaintiffs are the business committee of the Delawares as such committee and individuals, and other individual Delawares, who sue on their own behalf and on behalf of children and descendants of Registered Delawares.

It is proper that all persons concerned should be represented as parties, but it would be cumbersome to mention the names of all the living Delawares.

If it be contended that the Delawares do not exist as a tribe, this contention will have no merit. The Delawares have since their admission to the Cherokee Nation preserved their tribal organization, their form of government; they had their separate communal interests, and have dealt with the United States through their own officers, independently of the Cherokee Nation. This is substantiated by evidence in the record of Simon Secondyne (38, 37), of John Bullette (42, 43, 45), of John Willson (49), of Mary E. Armstrong (58), of Mary C. Beysiau (66, 67), of Henry Armstrong (72), of Stephen Miller (76), of William Adams (81).

The Delawares as a tribe or nation made their own improvements, built their own churches and their own school houses, and erected their homes out of their funds. Simon Secondyne (37), Stephen Miller (76), William Adams (81–82).

The Delawares were a tribe when they entered into this agreement; they entered into it as a tribe for tribal purposes. After the execution of the agreement they kept up their tribal organization and their communal rights, and they are properly in court, both as a tribe and as individuals. Now that the time for allotting land has come, they desire that these lands be awarded them as a tribe so that they can distribute them among their various members.

There can be no claim that the Delawares did not maintain their tribal organization. It will appear from the record and the files of the departments of the Government that they had tribal funds invested with the Government amounting to nearly one million dollars, after they had paid the

Cherokees the money agreed upon for the purchase of lands and citizenship, which fund was held by the Government until 1891 and 1893, when it was distributed per capita among the Delawares, with the understanding that the money should be used in the improvement of their homes. Between 1867 and 1893 the Delawares received semiannual payments and interest upon this fund.

The Government dealt with them as a tribe with respect to their tribal funds and property.

POINT V.

The Delaware and Cherokee Treaties of 1866, in Connection with the Delaware-Cherokee Agreement of 1867, Show Upon Their Face, Without the Aid of Parol Evidence, That the Delawares as a Tribe Purchased from the Cherokee Nation an Aggregate Quantity of 157,600 Acres of Land to be Occupied by the Delaware Tribe in Communal Ownership and to Remain as the Property of Such Tribe Not Only as Long as Any Registered Delaware Should Survive, But Also as Long as Any Descendant of Such Registered Delaware Should Exist and as Long as the Tribe Should Continue to Occupy and Improve Such Lands, Their Title Being the Same Title by Occupany as Was Theretofore Owned by the Cherokee Nation Which Granted These Lands.

In the discussion of this proposition it will be useful to divide the argument under various heads, all of which tend to the demonstration of the proposition which is at the head of this point.

POINT V—SUBDIVISION A.

Proper Construction of the Delaware and Cherokee Treaties and the Delaware-Cherokee Agreements.

We have already in a preceding point quoted from the Cherokee treaty of 1866, the Delaware treaty of 1866, and the said agreement of purchase. It will be observed that the Cherokee treaty provided that where a tribe should remove and preserve its tribal organization it should have—

> "a district of country set out for their use by metes and bounds equal to 160 acres if they should so decide, for each man, woman and child of such tribe,"

and thus was provided a measure to ascertain the quantity of land which the tribe should secure; hence the necessity of the register provided for in the Delaware-Cherokee agreement.

In the Delaware treaty the United States proposed to *sell* to the Delawares a tract of land to be selected in a compact form. This body of land was to be equal to 160 acres for each Delaware, and land was to be surveyed and finally allotted.

The fact that in the agreement when signed the land was not in compact form makes no difference. The purpose of both treaties was that whatever land should be sold should belong to the tribe as a tribe. In fact, the Delaware treaty provided that the Delawares need not remove from Kansas until they shall have "selected and received title to lands for new homes elsewhere."

These treaties provide for an adequate scheme of removal. The method of fixing the amount of land was settled. There was to be a particular amount of it, depending upon the

numbers of Delawares on the list. The Delawares, as a whole, should get title, and they were to pay from their tribal funds, according to the number of acres they got by this methed.

It can not be supposed that these fundamental provisions of these treaties were intended to be abrogated when the agreement itself was made. The title which the Delawares were to get necessarily was only such title as could be conferred by the Indian tribe which proposed to sell. It had to be a title by occupancy. Individual Delawares were not authorized to contract; the action was a tribal action on both sides.

Now, when we come to consider the agreement of purchase which refers to these treaties, we observe that the Cherokees agreed to sell to the Delawares for their *occupancy*. In other words, they agreed to give what title the Cherokees had, and the same title, the highest kind of an Indian title. The agreement did not state that each Delaware was to get a separate tract, but that the *Delawares* were to get a *quantity* of land, which quantity was to be measured by the product of 985 by 160. The lands were spoken of as purchased, and not only occupancy, but ownership was guaranteed. The lands were to be paid for. The agreement was tripartite between the two tribes and approved by the United States. It only had force or virtue by reason of the previous treaties of 1866, and in interpreting the agreement we necessarily must incorporate, so far as is possible, the terms of the previous treaties. The agreement was not intended to grant a less title than the Cherokees had. It was not intended that the Cherokees should merely part with a life interest and retain the reversion. It was intended that the Cherokees should sell whatever they had and part with the land once for all.

Upon the face of these documents, in view of the history of the times, it is quite evident that the construction made by the court below is not well founded.

It is proper to consider also the circumstances surround-

ing the making of these treaties and this agreement. We will later on discuss the evidence submitted to show that the Delawares understood the treaty to mean precisely what we say it means on its face, that is to say:

1. The Cherokees sold to the Delawares this body of land as a whole to be selected by individual members in different locations, not to interfere with Cherokee selections, the lands to be the exclusive property of the Delaware tribe, subject to the jurisdiction of the Cherokee government for government purposes, with the necessary restrictions against alienation, which was a part of the Government's policy in dealing with the Indians.

2. When the Delawares as a tribe paid from their tribal funds certain other moneys, then the registered Delawares and their descendants obtained additional rights of citizenship and additional rights in the other lands and funds of the Nation.

When the public history of the times is considered in connection with the language of the agreement and the testimony of witnesses, it will be observed that the evidence is precisely in line with what these documents show upon their face, and this court is authorized, in view of the language of these treaties and the other facts mentioned, to consider this evidence.

This agreement is by the Cherokee Nation to a Delaware tribe, and it may be called a public grant.

The general rule of construction of deeds of grant is that the language is to be construed strictly against the grantor and in favor of the grantee. This rule does not apply to public grants, in which case the construction is in favor of the State, except when the grant is based on a consideration moving from the grantee, when the general rule applies as between private parties and the construction must be strictly in favor of the grantee.

Bridge *vs.* Bridge, 7 Pick. (Mass.), 344.
Same, 11 Pet. (U. S.), 591.
Langdon *vs.* New York, 93 N. Y. 129.

In this case there was an adequate valuable consideration moving from the Delawares, the grantees, to the Cherokee Nation, the grantor.

> "In construing a statute, courts may refer to the history of the times to ascertain the reason for and the meaning of its terms."
>
> United States *vs.* Union Pacific Railroad, 91 U. S. 72.
>
> Aldridge *vs.* Williams, 3 How. 9.
>
> District of Columbia *vs.* Washington Market Co., 108 U. S. 243.
>
> Kalzenberger *vs.* Aberdeen, 16 Fed. Rep. 745.

> "In construing statutes the state of things as they appeared to the legislature at the time of enactment may be considered."
>
> Platt *vs.* Northern Pacific Railroad Co., 99 U. S. 48.

> "A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter, and a thing which is within the letter of a statute is not within the statute unless it be within the intention of the makers; and such construction ought to be put upon it as does not suffer it to be eluded."
>
> People *vs.* Utica Ins. Co., 15 Johns, 358.

Much help in the interpretation of the Delaware-Cherokee agreement will be gained by looking into the history of the times preceding, during, and subsequent to the making of the agreement. It is a fact of which the court will take notice that the General Government soon after the Civil War adopted the policy of acquiring from the five civilized tribes, who owned all the lands in the Indian Territory, a part of said lands for the purpose of collecting in that Territory all the Indians in the United States friendly to each other. For this purpose treaties had been completed with

the Choctaw, Chickasaw, Creek, and Seminole Nations, by which cessions of a part of their possessions had been made to the United States for the purpose of settling friendly Indians thereon, when on July 4, 1866, the treaty with the Delawares providing for their removal to the Indian Territory was agreed on, and a treaty with the Cherokees was being negotiated which, it was contemplated, would contain a cession of lands for the purpose of settling friendly Indians thereon, similar to those contained in the treaties with the other tribes.

The Delawares had sent delegations to the Territory and they had examined several tracts of country that were subject under the treaties with the five civilized tribes to settlement or purchase by friendly Indians.

In the Cherokee treaty of July 19, 1866, there was no cession of lands, but by article 15 the United States was given the privilege of settling any civilized Indians friendly with the Cherokees and the adjacent tribes within the Cherokee country east of the ninety-sixth meridian of longitude, on such terms as might be agreed upon between the Indians so settling and the Cherokees, with the approval of the President, such terms, however, to be consistent with certain general provisions which are an important factor in the interpretation of the Delaware-Cherokee agreement, which it must be presumed was drawn to be consistent therewith, and it is highly proper at this time to give them careful consideration.

There were two plans outlined:

1. For the settlement of Indians who would abandon their own tribal organization and become citizens of the nation; and—

2. For the settlement of Indians who wished to preserve their tribal organization, and maintain their tribal laws, customs, and usages, not inconsistent with the constitution and laws of the Cherokee Nation, and also enjoy all the rights of native Cherokees.

As to the first class, it is provided that the terms of their settlement must contain a provision for the payment into the Cherokee national fund of a certain sum of money—

> "which shall sustain the same proportion to the then existing national fund that the number of Indians sustain to the whole number of Cherokees then residing in the Cherokee country."

When this is done, the Indians so paying—

> "shall be incorporated into and ever after remain a part of the Cherokee Nation, on equal terms in every respect with the native citizens."

Where the Indians settling desired to preserve their tribal organization and maintain their tribal laws, customs, and usages, not inconsistent with the constitution and laws of the Cherokee Nation, the terms on which they were to settle must contain provision for the setting off to them of a district of country equal to 160 acres of land for each man, woman, and child, if desired, to be paid for by them at a price to be agreed on or to be fixed by the President, and *also* a provision for the payment by them into the national fund of a sum of money—

> "to be agreed on by the respective parties, not greater in proportion to the whole existing national fund, and the probable proceeds of the lands herein ceded or authorized to be ceded or sold, than their numbers bear to the whole number of Cherokees then residing in said country (after which) they shall enjoy all the rights and immunities of native Cherokees."

In the one case the Indians were to purchase the rights of citizenship simply, which gave them only the same rights of property enjoyed by the native citizens; while in the other case, the Indians acquired these rights of citizenship, and in addition purchased land to be held in their own right. *This is what the Delawares did.*

This treaty with the Cherokees and the treaty of July 4, 1866, with the Delawares, must be considered in connection with the Delaware-Cherokee agreement, as these two treaties were the law of the land relating to the subject-matter, and would have been a part of the agreement even if they had not been referred to therein and thus made a part.

The stipulations of the Delaware treaty of 1866 have therefore an important bearing on the subject and should be carefully considered.

It will be seen that the scheme of removal of the Delawares contemplated, as provided in article 4, the sale by the United States to the Delawares of a part of the lands that the Government had purchased from the Creeks, Seminoles, and Choctaws, and Chickasaws, or expected to purchase from the Cherokees.

From an examination of the provisions of this treaty, it appears that the Delawares approached the subject of selecting and purchasing their new homes with no other understanding or purpose than that the lands so selected and purchased by them would belong to them free from any rights of property in any other Indian tribe or nation, or in the United States. The Cherokees likewise understood when they agreed to sell lands to the Delawares that they parted with their rights of property in the lands sold. The Delawares reserved the right to and have preserved their separate tribal organization, and have maintained their tribal laws, usages, and customs not inconsistent with the constitution and laws of the Cherokee Nation.

By the Cherokee treaty Indians who became citizens and abandoned their separate tribal organizations were to be required to pay a sum of money which should sustain the same proportion to the then existing national fund that the number of Indians sustained to the whole number of Cherokees then residing in the Cherokee country. But the tribe which reserved the right of preserving their tribal

organization, and which purchased land from the Cherokees, was to—

> "pay into the national fund a sum of money, to be agreed on by the respective parties, *not greater* in proportion to the whole existing national fund *and the probable proceeds of the lands herein ceded or authorized to be ceded or sold* than their numbers bear to the whole number of Cherokees then residing in said country."

In both instances, however, the consideration for the payments into the national fund was "all the rights of native Cherokees."

Where the Indians preserved their tribal organization they were to purchase lands in sole and separate ownership, paying therefor such price as might be agreed on by them and the Cherokees, or fixed by the President in case of disagreement. The purchase of such lands was to be a transaction *separate and distinct* from the purchase of the rights of citizenship, which carried with it "all the rights of native Cherokees."

The difference between the rights of the two classes is illustrated by a comparison of the provisions of the agreement between the Cherokees and the Shawnees, by which the latter agreed to abandon their tribal organization, and became citizens of the nation (this agreement is in complainant's Exhibit S, at page 403 thereof, a book filed in the court below but not fully printed on appeal), with the provisions of the Delaware-Cherokee agreement, which are directly before the court in this suit for interpretation. By this agreement with the Shawnees it was provided that certain annual sums payable to the Shawnees, amounting to $5,000, and arising under the Shawnee treaties of 1795, 1817, and 1854, should thereafter be paid to the Cherokee Nation and become the annuities and interests and investments of said nation. It was also provided that as soon as the United States received the sum of

$50,000 from the sale of the Shawnee lands in Kansas, said sum should be paid to the Cherokees. And it was further provided "that the said Shawnees shall abandon their tribal organization."

The grant to the Shawnees is expressed in this agreement, as follows:

> "And it is further agreed by the parties hereto, that in consideration of the said payments and acts agreed upon, as hereinbefore stated, the said Cherokees will receive the said Shawnees . . . into the country of the said Cherokees, upon unoccupied lands east of the 96°, and that the said Shawnees shall be incorporated into and ever after remain a part of the Cherokee Nation, on equal terms in every respect, and with all the privileges and immunities of native citizens of the Cherokee Nation."

Quite a different arrangement was agreed upon between the Delawares and Cherokees (Rec. p. 286 et seq.). In the first place the agreement between them contains no stipulation for the abandonment of tribal organization by the Delawares. Then again, the Cherokees agree to sell to the Delawares 160 acres of land for each man, woman, and child whose name appeared on a certain register referred to and described. This land was to be selected by the Delawares in any part of the Nation east of the 96th degree, not to interfere with the lands selected by other citizens of the Nation as their homes. The continued ownership and occupancy of the lands thus purchased it is provided shall not be interfered with in any manner whatever without their consent. A very significant proviso to the agreement then follows. It is significant as showing what title it was intended that the Delawares should receive to the lands they purchased. This proviso is as follows:

> "*Provided*, that nothing herein shall confer the right to alienate, convey, or dispose of any such

lands, except in accordance with the constitution and laws of said Cherokee Nation."

Unless it had been intended that the lands should become the *property* of the Delawares, free from any right of property in the Cherokee Nation or the Cherokees, this proviso would not have been necessary, and it is not to be presumed that the parties negotiating the sale would have used the words of restriction without some reason. If such a provision had not been inserted the Delawares might have brought in other persons who would not be subject to the jurisdiction of the Cherokee Nation, but notwithstanding that, would have property rights in the lands within the exterior boundaries of the Nation.

Another significant provision is the guaranty of the "aggregate *amount* of land herein provided for the Delawares" in case the Cherokee lands should hereafter be allotted in severalty. This provision evidently was intended to mean that no matter how populous the Cherokee Nation should in the future become, the Delawares should always have their 157,600 acres of land, as well as their other rights in other lands and funds of the Cherokee Nation.

These are the principal features of that part of the agreement which has relation to the purchase of lands by the Delawares, and if the agreement contained no other provisions relating to citizenship there can be no doubt that the Delaware Indians would be held to have bought the land outright, with the condition against alienation, which had the effect only of making the lands thus purchased remain a part of the Cherokee Nation for purposes of government. *This part of the agreement is as distinct and separate from the part providing for the purchase of rights of citizenship as it would have been if contained in a separate instrument*, and the rights acquired by the Delawares thereunder are not in any wise modified, abridged, or curtailed by the rights acquired by the provision under which they secured the privileges and immunities of native Cherokees.

In fulfillment of the conditions imposed on the Delawares by the provisions for the purchase of lands by them from the Cherokee Nation, the Secretary of the Interior paid to the Cherokee Nation out of the funds of the Delawares on May 13, 1869, the sum of $157,600, being $1 per acre for 157,600 acres, which was the aggregate amount of lands purchased for 985 Delawares at 160 acres apiece (Rec. p. 433). On this payment the land transaction was complete and the Delawares became entitled to that amount of land. It was not susceptible of identification, however, until within the past few years—after the Cherokee Nation was surveyed by the Government—and the Delawares have not been able to point out the exact 157,600 acres they had selected until after this suit began.

These lands have been identified, as shown by the deposition of Horace M. Adams (Rec. pp. 338–390) and complainant's exhibits BB to FFFFF, inclusive, and the court is asked to give judgment therefor as identified.

The *other* part of the Delaware agreement provides for the purchase by the Delawares of all the "rights of native Cherokees." This is no more dependent upon the purchase of lands than is the purchase of lands dependent on the purchase of citizenship. They agreed to pay and did pay into the Cherokee national fund (including the probable proceeds of the lands ceded or authorized to be ceded) a sum of money which sustained the same proportion to said national fund as the Delawares sustained to all the Cherokees, or about $123 per capita. For this payment the Cherokees agreed that they should—

> "become members of the Cherokee Nation, with the same rights and immunities, and the same participation (and no other) in the national fund, as native Cherokees, save as hereinbefore provided."

This grant analyzed, would, as it is punctuated, read—

> "shall become members of the Cherokee Nation, with the same rights and immunities as native Cherokees,

save as hereinbefore provided, and with the same participation (and no other) in the national funds as native Cherokees."

Thus analyzed, there can be but one conclusion, and that is, the Delawares' rights and immunities are the same as the native Cherokees, except that in addition to a right to an allotment as a Cherokee he would also have the right as a Delaware to share in the 157,600 acres which the Delawares had purchased and in which the Cherokees could not and did not claim any rights of property.

When we take into consideration the provisions of the Delaware treaty of 1866, providing for the removal of the Delawares, and especially articles 4, 5, 11, and 15; the provisions of article 15 of the Cherokee treaty of 1866, by which the Cherokees agreed to admit other tribes of friendly Indians within their home tract, on one or two plans hereinbefore recited; the Shawnee agreement whereby these Indians became citizens of the Cherokee Nation and agreed to abandon their tribal organization; and the Delaware agreement which makes the provisions of the two treaties referred to a part thereof by reference, it will be seen that the construction placed on the agreement by the contracting parties, as testified to by the witnesses introduced by the complainants, was well founded and in harmony with the language used in the agreement.

It will be seen, also, that the Delawares had bought 157,600 acres of land to be owned by them in their own right, and also all the rights of native Cherokees, both in the lands other than said 157,600 acres, and the moneys of the nation. This construction of the agreement is not weakened by the fact that the Delawares were forbidden to sell the lands "except in accordance with the constitution and laws of the Cherokee Nation."

It has been well held that limitations of the power of alienation where Indian tribes are concerned do not take away from the character of the title. They are useful and

necessary conditions to prevent white settlers and others from taking possession of Indian lands when they are under no obligation to obey Indian constitutions or laws. The idea is to prevent a sale by Indians until the time comes when the lands can be allotted, at which time the occupancy title in the tribe as a whole is changed to the fee title in the several members of the tribe in severalty.

See Pickering *vs.* Lomax, 145 U. S. 313, 120 Ill. 289.
Smith *vs.* Henry, 41 Fed. Rep. 705.
Libbey *vs.* Clark, 118 U. S. 250.
Ross *vs.* Eells, 56 Fed. Rep. 855.

The clause in the agreement, therefore, which restricts the Delawares from selling the lands purchased, except in accordance with the constitution and laws of the Cherokee Nation, does not deprive the title obtained by the Delawares of its character as an Indian title of occupancy, as will be seen by what the courts have held touching such restrictions. This restriction, it is to be observed, is not coupled in any way with any provision of forfeiture, and this also would show that it was not intended by the Indians, parties to the agreement, that these lands should, under any circumstances, revert to the Cherokee Nation. It would follow, therefore, that even if the Delawares did sell or convey these lands in a manner otherwise than in accordance with the constitution and laws of the Cherokee Nation, no forfeiture to the Cherokee Nation would be worked by such action on their part. The fact is clearly shown by the record and the language used in the agreement that the intention of the contracting parties was that the Delawares would acquire all the property in the lands sold to them, and the condition against alienating could not, therefore, be referred to to defeat their title and reinvest it in the Cherokee Nation, even if that condition be violated.

Nor is this construction weakened by the fact that the agreement contains no provision for the issuing of a patent

or deed to the Delawares as an evidence of their title, or as conveying said title to them, for it was held in Harris *vs.* Doe, 4 Blackf. (Ind.) 370, that—

> "a treaty with the Indians so far as respects the grants of land to individuals contained in it, is evidence of the grantees' title, and as such proper to be laid before a jury."

In Verden *vs.* Coleman, 4 Ind. 457, it was held that—

> "where the act or treaty provides no other mode of conveyance, the courts incline by construction to make the terms of the act of treaty operate as grants, where the language, taken altogether in connection with what may be supposed to have been the intention, will admit it."

POINT V.—SUBDIVISION B.

The Word "Occupancy" in the Agreement of 1867 Was Intended as a Designation of the Highest Kind of Indian Title or as a Description of the Purpose for Which the Lands Were Sold, and Was Not Intended as a Limitation Upon the Title Granted.

The agreement states that the sale is made to the Delawares *for their occupancy*. This is by no means a limitation of the title. At the time it was desired by the Government and the Cherokees that the Delawares should not only remove, but should *occupy* the lands they were buying. The State of Kansas was clamorous for the removal of all Indians retaining tribal organizations. The lands were the best in the State. White settlers insisted upon occupying them. The United States desired that the Delawares should remove.

On the other hand, the Cherokees desired that whoever removed to their lands should also *live* there. The Cherokees did not wish to sell land within their jurisdiction to anyone except to such persons as would actually occupy it and im-

prove it; to such persons as would be within the jurisdiction of the laws of the Nation.

Should these lands be sold to the Delawares outright for some purpose other than occupancy, the Delawares might live outside the Nation and might sell to persons obnoxious to the Cherokees, and who, while having property rights, would not be subject to the control of the Cherokee National Government. It was therefore expressly stated that the sale was for actual occupancy. Then, too, the word "occupancy" is most appropriate to describe the Indian title to lands, and evidently referred to the title which the Cherokees themselves held.

It is difficult to understand how this word "occupancy" can be construed to mean merely a life estate in individual Delawares; the individuals were not contracting, the two nations were. It would be contrary to all justice and reason to hold that an Indian tribe which, by virture of treaties, secures a reservation for its occupancy, would lose lands as soon as the members of the tribe, existing at the time, should die.

The word "occupancy" is always used in an Indian treaty as a *technical* term, and secures to the tribe as a whole an Indian title which lasts as long as the tribe exists, and can only be extinguished by some other treaty. *The right of occupaucy to an Indian reservation is recognized as belonging to Indians of the tribe born after the treaty as well as those living at the time of the treaty.*

If stress is laid by the defendants upon the word "occupancy" it does not help defendants, for the result would be that an occupancy title having passed, it necessarily extended to all the 157,600 acres, and the defendant Nation can not claim any of these lands at least as long as any members of the Delaware tribe exist.

In considering the question of a life estate and the question of the meaning of the words "for their occupancy" it should be remembered that if the Delawares had only

bought *citizenship*, each Delaware could have had a *life estate* in as large a tract of land as each Delaware could have improved, and could have kept other people a quarter of a mile away from his improvements, and these improvements upon the death of each Delaware would have descended to his heirs at law under the authority of the Cherokee constitution and laws. This is true, considering each Delaware merely as a Cherokee citizen.

Then why should it be claimed that the Delawares upon paying an additional sum for something *more* than citizenship merely acquired just what they got by paying for citizenship alone?

The Shawnees acquired life estates by merely paying for citizenship. Does it not seem absurd, then, that the Delawares should pay this large sum of money, $157,600, for a privilege that they had already acquired under the second half of the agreement itself?

There is no force in the said arguments of the respondent with respect to the word "occupancy." As was said by Chief Justice Marshall, in Cherokee Nation *vs* Georgia, 5 Peters, 1, the Indians of all tribes hold their lands jointly by "title by occupancy." This is an aboriginal right, not to be terminated at will or by the caprice of government, but only by reason of negotiations or treaties. This right of occupancy is the highest title which the Indians understood they had, and when they got such a title they always secured full and complete rights to use and enjoy the land, which lasted as long as there was a living member of the tribe.

POINT V.—SUBDIVISION C.

Words of Perpetuity are Not Necessary to the Vesting of Title in the Delawares to the Lands They Claim.

It is true that the agreement does not refer to heirs or assigns. The agreement is not a deed or a patent; it is a treaty whereby the Cherokees parted with their title; a

treaty between two independent nations dealing in their corporate capacity. A nation can not have heirs or assigns. The Delaware Nation or tribe can have no heirs.

In United States *vs.* Reese, 5 Dill, 405, it was stated as follows:

> "At the common law, by a rule which in this country is purely technical, the word 'heirs' is necessary in a fee simple grant, but this rule did not apply to grants to a corporation aggregate, and the Cherokee Nation may be regarded under the law as a corporation aggregate."

If a mere life estate was intended, words of purchase and sale would not have been used. The provisions would merely have been for a *settlement* upon the lands.

Naturally, the grant was not made to the Delawares or their assigns; such a grant would not have been of any force, for under the laws of the United States, section 2116 R. S., an Indian tribe was prohibited from selling its lands unless the sale was authorized or made by a treaty or convention, and this same section prohibited all persons not employed under the authority of the United States from attempting to negotiate such treaty directly or indirectly, or from attempting to treat with Indian tribes for the title or purchase of lands. These are general prohibitions.

Therefore the character of *title* of Indian tribes in lands did not affect their right to sell them. The United States were a party to the Delaware agreement, and as it was against the policy of the Government to allow Indian tribes to sell their lands, the absence of any words in the agreement which would indicate a right in the *assigns* of the Delawares is not significant.

Our claim is, and it should be carefully remembered, that the Cherokees did not sell 160 acres to each of 985 individuals, but sold to the Nation or tribe of the Delawares an aggregate body of land whose amount was determined as aforesaid. Remember that the Cherokees did not attempt to

distribute this quantity, but allowed the Delaware Nation to determine whether the land should be divided and how, and left to them all of the questions in regard to the ownership and individual occupancy of the lands, guaranteeing quiet enjoyment.

POINT V.—SUBDIVISION D.

The Delawares Secured Whatever Title the Cherokees Had.

We may concede that no individual Cherokee owned any particular section of land, but the Cherokee Nation as a whole owned all the land. We may concede that no individual Delaware owned any particular portion of the granted lands, but the Delaware tribe as a whole owned them all by right of occupancy. The right of the Delawares born since the agreement in the granted lands depends upon the fact that by birth they became members of the Delaware tribe; upon being born they have a communal interest in all of the lands belonging to the tribe. The rights of any individual Delaware to the Delaware grant of land are certainly no less than the rights of any individual Cherokee in the rest of the common domain. The courts have held that an individual Cherokee citizen has such a permanent right in lands occupied and improved as amounts practically to a fee, and this right of occupancy may be transferred to other citizens, or may descend by inheritance. He practically gets the land and its increase as though he holds a fee; he has a durable and permanent interest in the lands so as to entitle him to compensation if any additional servitude is placed upon him, as in the construction of a railroad. While a Cherokee citizen does not have a fee in the land he occupies, he can hold it forever and enjoy his profits, and this right may descend to his heirs.

Payne *vs* Railroad, 46 Fed. Rep. 546.

Now, if the Delaware tribe got from the Cherokee Nation whatever title that nation had to these granted lands, the

individual rights of the individual members of the Delaware tribe must be at least as great in such lands occupied by them as was the case with Cherokee citizens prior to the grant.

It is not important as between the parties hereto whether the Delawares got a fee or Indian title by occupancy; they certainly got such a title as lasts as long as members of the tribe (whether born before or after the agreement) shall be in existence. There was nothing said in the agreement that after the death of the registered Delawares the land granted should *revert* to the Cherokee Nation and become a part of the national domain. On the contrary, all the expressions of the agreement go to show that the Cherokees thought they had parted with this land once and forever.

POINT V.—SUBDIVISION E.

If the Court Below is to be Sustained, the Question Naturally Arises What, if Anything, Did the Delawares Get for Their Extra Payment of $157,600?

As seen in the Journeycake case above quoted, the Delawares secured citizenship rights in the Cherokee Nation, equal rights in all the lands and funds of the Nation, by merely making a specific payment, as provided in the second portion of the agreement.

One of the rights growing out of the citizenship so purchased was to take up, improve, and occupy any part of the common domain, as provided in the Cherokee constitution, article 1, section 2, which also provides that no Cherokee can even dispose of improvements to outside parties (2982).

By Cherokee act of September 24, 1839, in force when the agreement was made, Cherokee citizens were protected from intrusion when they had made their settlements. (See laws of Cherokee Nation, 1875, page 249; see complainant's exhibit 01.)

It is quite evident that by paying $121,824.28 for citizenship, the Delawares acquired as citizens the right to improve

and occupy lands *other than* the 157,600 acres, with such an indefeasible right of possession and occupancy as to be practically a fee simple.

Payne *vs.* Railroad Co., 46 Fed. Rep. 546.

Such a right as this was upheld in the case of the Shawnees, who by their agreement merely bought citizenship rights.

See Cherokee Nation *vs.* Blackfeather, 155 U. S. 218.

If by the payment of $121,824.28 for citizenship, the Delawares had all the rights of occupancy in the public domain of the Cherokee Nation that a native citizen had, as is decided by this court and the Supreme Court, *it is pertinent to ask what rights did the Delawares acquire or what advantages did they gain by paying the additional large sum of $157,600 into the Cherokee treasury, if the contention of the Cherokee Nation now made in this suit is upheld? What did the Delaware tribe gain by paying into the Cherokee treasury $160 on account of each individual of the 985 registered Delawares? Surely they bought something more than mere citizenship by that payment, since they paid another and separate sum (ascertained strictly in accordance with fifteenth article of the treaty of 1866 with the Cherokees) for the right of citizenship alone.*

The total quantity of lands in the Cherokee Nation, if alloted per capita to all citizens of the Nation, it is estimated would give to each citizen about 140 acres. There are about 200 living registered Delawares, and the Cherokee Nation's contention is that all the advantages the Delawares got by the agreement is to have allotted *now* to the living registered Delawares 160 acres each, while the other citizens of the Cherokee Nation will receive only about 140; in other words, the Cherokee Nation's contention is that for the $157,600 paid in by the Delawares, *the Delawares now get on the allotment of the lands twenty acres apiece for 200 Delawares*

more than the other citizens of the Cherokee Nation, or about 4,000 acres, for which they paid thirty-three years ago $157,600, or about $40 an acre, while other lands in the Indian Territory were sold about the same time, some at about nine cents, some at fifteen cents, some at thirty cents, and some at seventy cents, being lands of the same character. Surely the Delawares got something more than this.

Remember that the agreement provides that when the Cherokee lands were allotted "the aggregate amount of land herein provided for the Delawares" shall be guaranteed.

Remember that the guarantee was made "to each Delaware incorporated by these articles into the Cherokee Nation." The persons so incorporated were the 985 Delawares and also their descendants, FOR THESE DESCENDANTS UPON BEING BORN BECAME CHEROKEES.

The guaranty here set forth in the Delaware-Cherokee agreement deserves particular consideration. This guaranty was not merely given to the Delaware Nation as such, but was also a guaranty to each individual who then composed it and to the last survivor or descendant of such individual. This guaranty was, in effect, a statement by the Cherokee Nation to the Delawares that this aggregate body of land should belong to the Delaware Nation and the individual Delawares when the lands should be allotted, no matter what future contingencies should arise, and whether or not 985 Delawares survived, or whether there was only one sole survivor. It was in effect a grant to the nation and the individuals composing it in joint tenancy, with right of survivorship.

This guaranty was for each Delaware, as we have stated, and meant that no matter what should occur in the future, the Delaware lands should be possessed by them forever, even if the remaining lands of the Cherokees by some contingency should be diminished in amount. No contingency should subtract from the Delawares' rights in the lands, and this guaranty extended to the Delaware tribe and its mem-

bers and the remaining descendants of them. Such a guaranty would not be fulfilled if when one Delaware died the common domain of the Delawares should be diminished by 160 acres, and so on for each death. Such a construction would be unreasonable, as we have elsewhere shown.

Thus it will be seen that the expression "160 acres" is thrown in parenthetically for the purpose of showing what was the *aggregate* amount of land provided in the agreement for the Delawares. This provision guaranteed such *aggregate* to each Delaware. It was by no means intended by this part of the agreement to guarantee to the individuals merely 160 acres as long as they lived and occupied the land.

The lands purchased in 1867 were of inconsiderable value, according to market rates. One dollar an acre was a very high price even to pay for these lands in fee simple; it would be a very extraordinarily high price if merely a life estate was purchased. It would practically amount to-day, in view of deaths of registered Delawares, to $40 an acre, as we have seen.

Prices of similar lands in 1867 purchased by the United States ranged from 15 cents to 70 cents an acre, the latter price being fixed by the President for lands of the Cherokees in the Cherokee outlet.

A great body of those outlet lands amounting to over 6,000,000 of acres were appraised by the President at 47.49 cents per acre. The Seminoles bought a tract from the Creeks, consisting of 200,000 acres, at 50 cents an acre. They got a full title to it, and no question is raised as to any interest remaining in the Creek Nation. The Citizen Band of Pottawatomie Indians and the Absentee Shawnees were by the act of 1872 (17 Stats. L. 169) permitted to buy homes within the 30-mile-square tract selected for them out of lands purchased by the United States from the Seminoles and Creeks at the rate per acre paid by the United States, that is, 15 cents for Seminole and 30 cents for Creek lands. These Indians were removed from Kansas.

It is very evident, then, that by paying $157,600 the Delawares got something more than a proportionate share in the lands and funds of the Cherokee Nation.

This additional right must have been a strong title to the 157,600 acres.

If the Delawares had paid two or three cents only an acre then there might be some justice in claiming that they only got life interest; inasmuch as they paid much above the market price of lands, it is clear that they must have got an indefeasible title to the lands purchased.

It is very important to consider that the Delawares, upon paying the amounts specified in the agreement, furnished to the Cherokees interest-bearing 6 per cent bonds. In the record, pages 433 and 457, are shown in detail the bonds which were tranferred from the account of the Delawares to the account of the Cherokees in payment of these moneys.

If the amount paid for these lands had been retained and the interest collected and paid to the Delawares, they would have received in interest up to April 8, 1903, over $340,000, and would still retain the principal of $157,600.

Likewise, the interest for a similar time on $121,824.28, paid for citizenship, would amount to over $263,000, and the principal of that sum would still be on hand.

The interest on the total amount the Delawares paid to the Cherokees for both lands and citizenship amounts to over $603,000, and together with the principal the total amount would be over $882,000.

Now, if the Delawares had kept these funds and received this interest, of course none of it would have reverted to the Cherokee Nation, and this principal and this interest would have been divided per capita among the Delawares now living.

It would seem to follow, therefore, that the *proceeds* of what the Delawares purchased with their moneys in 1867 should also be divided among the Delawares now living, and that it does not belong to the Cherokee Nation any

more than the Delawares' money would have belonged to that Nation if the Delawares had kept it invested for their own account in the said bonds.

POINT V.—SUBDIVISION F.

The Indefeasible Nature of the Delaware Title to Lands in the Cherokee Nation has been Officially Recognized, Both by the Government of the United States and the Cherokee Nation.

The court will take notice of the fact that Hon. Nathaniel G. Taylor was Commissioner of Indian Affairs from March 29, 1867, until April 20, 1869, when he was succeeded by Hon. Eli S. Parker. The dates of Mr. Taylor's service as Commissioner of Indian Affairs include the date of the Delaware-Cherokee agreement, which was April 8, 1867.

The record shows that this agreement was negotiated between the Cherokees and the Delawares at conferences had by the delegates of the two tribes with and in the presence of the Commissioner of Indian Affairs (see deposition John G. Pratt, Rec. p. 85). It was approved by the Secretary of the Interior and by the President of the United States. It is to be supposed, therefore, as the United States itself became a party to the agreement, that the Commissioner of Indian Affairs, who was present at the negotiations and who, no doubt, assisted in them, fully understood the intent of the parties and could correctly state the character of the property obtained by the Delawares in the land they were to select under the agreement out of the Cherokee Nation, east of the 96th meridian of west longitude. It is, therefore, proper to examine the references that may be made by the Commissioner of Indian Affairs, Mr. Taylor, to this agreement, and especially to the question of the rights in the lands that the Delawares bought of the Cherokees.

In the report of April 7, 1869, of the Secretary of the

Interior, Mr. Taylor, as Commissioner of Indian Affairs, makes a statement of the funds held in trust for the Delawares by the Government of the United States, and uses language indicating that the Delawares had obtained something more than the mere rights of citizenship in the Cherokee Nation, with the additional right of a life estate in 160 acres of land. Speaking of the agreement, he says:

> "It proves that the Delawares may select a quantity of land east of the line of 96° west longitude, Cherokee Nation, in the aggregate equal to 160 acres for each individual of the Delaware tribe . . . for which land the Cherokees are to be paid from the Delaware funds now held by the United States a sum equal to $1 per acre.
>
> . . . . . .
>
> "The Delawares who elected to remove, or most of them, have been in the Cherokee country about one year, occupying the lands which, by the terms of the agreement, were purchased from the Cherokees, and the latter are consequently desirous of having the matter concluded and finally disposed of by the Delawares either paying the amount due from them or having a sufficient amount of their stocks placed to the credit of the Cherokee Nation."

The Cherokee Nation up to and within the past few years has always admitted that the Delawares had full title to the lands sold to them under the agreement of 1867, and the attention of the court is invited to the fact that, in a case heretotore tried in court below, entitled "Journeycake vs. The United States and the Cherokee Nation," numbered 16,837 (28 C. Cl. 281), the defense of the Cherokee Nation was based partly on the allegation, as set forth in Defendants' Suggestion of Facts, Number 8—

> "that by the terms of said agreement and the payment of said sum of $157,600 said Delawares became the sole and separate owners of 157,600 acres of land east of the 96th, and no more, and acquire under said

agreement no other or further interest in the lands or dominion of the Cherokee Nation."

It will be remembered that the question in the Journey-cake case was what did the Delawares get in buying the rights and immunities of native Cherokees? The Cherokee Nation urged that the rights purchased were merely political. This contention was overthrown.

It was further urged in that suit that the payments made by the Delawares for these rights and immunities of native Cherokees were inadequate compensation for the rights of property claimed by them in that suit, and it was sought to show that to affirm their right would allow to the Delawares a greater property interest in the Cherokee Nation than was enjoyed by citizens of that Nation. It was sought to show, for the purpose of impressing the court with the gross inadequacy of the consideration paid to the Cherokees, that for a total sum of about $283 per capita they would be entitled to enjoy about $1,416 worth of property per capita, of which the Cherokees were alleged to have contributed over five times as much as the Delawares. In order to reach this conclusion the Cherokee outlet lands were estimated at $1.25 per acre. But the Supreme Court held that the basis of calculation was unfair and referred to the prices paid by the Government for the lands of the Creeks, Seminoles, Choctaws, and Chickasaws in 1866 as the proper basis of calculation and as being more nearly the value of the Cherokee lands at the time of the negotiation of the agreement with the Delawares. Taking these prices as a basis, therefore, the court held that the price paid by the Delawares for the privileges of citizenship was not inadequate.

Not only has the Government and the Cherokees recognized the Delaware title, but an investigation of the facts and history of the times indicates that it would be extremely unjust at this late day to so construe the agreement as to practically confiscate property for which many years ago the Delawares paid an excessively high price.

POINT V.—SUBDIVISION G.

The Nature of the Indian Title Secured by the Delawares.

By the agreement between the Delawares and the Cherokee Nation the Delawares got all the title to the land up to that time held by the Cherokee Nation, and whatever right of reversion the United States had in said lands also passed to the Delawares by the United States becoming a party to the agreement. The agreement, in fact, was a tripartite agreement, the parties being the Delawares, the Cherokees, and the United States. The subject-matter of that part of the agreement which related to the purchase of land was one in which the United States and the Cherokees were interested, and in which, by the agreement, the Delawares acquired the interests therein set forth.

As has been seen and herein stated, the Delawares acquired by agreement all the title of the Cherokees in the land and reversionary interest of the United States, if any existed in the United States. The only limitation on that title is expressed in the agreement, and that is, that the right of alienation is restricted to such alienation as was permissible under the constitution and laws of the Cherokee Nation. That is, the Delawares could not sell the lands to citizens of the United States, and this for the reason that it was against the policy of the Cherokee Nation to have within the Nation any class of residents owning property who would not be subject to the jurisdiction of the government of the Nation.

The title of the Cherokee Nation is a matter which has been passed on judicially in numerous forms of litigation. It has been described by the courts as a—

> "base, qualified, or determinable fee, without the right of reversion and only the possibility of reversion in the United States."

United States *vs.* Rogers, 23 Fed. Rep. 659.
In re Wolf, 27 Fed. 606.
Cherokee Nation *vs.* R. R. Co., 33 Fed. Rep. 900.

The courts have also held that, by the treaty of December 29, 1835 (7 Stat. 478), the United States made the sale of the lands to the Nation in fee simple, and that the fact and validity of this sale have been recognized by Congress through appropriations made in execution of the treaty making it.

Holden *vs.* Joy, 17 Wall, 211.
Mehlin *vs.* Ice, 56 Fed. Rep. 12.
Payne *vs.* R. R. Co., 46 Fed. Rep. 546.

The evidence of title of the Cherokees is contained in the treaties of 1828, 1833, and 1835 and the patent issued by the United States in 1838.

In the patent there is contained the following clause, in the hadendum thereof, to wit:

> "And subject also to the condition provided by the act of Congress of the twenty-eighth of May, one thousand eight hundred and thirty, referred to in the above recited third article, and which condition is that the lands hereby granted shall revert to the United States if said Cherokee Nation becomes extinct or abandons the same."

Besides the fact that the condition which would forfeit the title of the Cherokees to the United States or which would cause the reversion of the lands to the United States under this clause of the patent, has not occurred, and the fact that the courts have said that this clause does not create in the United States a right of reversion, but only a possibility of reversion, the courts without deciding the question have expressed a doubt as to the validity of that condition, saying that by the treaty of 1833 the grant was made to the Cherokee Nation in words sufficient to carry the fee and no greater title was obtained by the Nation in the treaty of 1835; that if, therefore, the clause imposing the condition

upon which reversion might occur was in restriction of the title granted by the treaties making the same, it would be void; and that, if the treaty of 1833, which granted the lands to the Cherokee Nation, did not provide for a condition limiting the title to the lands thus granted, this title could not be limited or affected by the importation into the patent of such condition and the same would be void and treated as surplusage in considering the title under the patent.

United States *vs.* Reese, 5 Dill. 405.

Certainly the Delawares secured whatever titles the Cherokees had, whether a base fee or an Indian title of occupancy.

It is sufficient to say that all title of the Cherokees in said lands was extinguished; that the full Cherokee title passed to the Delaware tribe as to 157,600 acres; that these lands are subject to allotment by the Delaware Council to its own people, as provided in the 4th article of the Delaware treaty of 1866, and that the mere restriction on alienation is of no force as an argument to cut down the title. This restriction will fall when the Cherokee government is abolished and when the lands are allotted. If a mere life estate had been granted to individual Delawares, this fact would necessarily have been particularly referred to and made plain beyond a peradventure.

POINT VI.

The Extrinsic Evidence Taken Aids the Court in Coming to a Decision That This Large Sum of Money Could Not Have Been Paid for the Securing Merely of 985 Separate Life Interests.

A. *This evidence discloses that many of the registered Delawares died* before the land contracted for had been turned over to the Delaware tribe. Nevertheless, the full amount contracted for, according to the roll of the 985 Delawares, was actually paid in and no objection was made by either

party on account of the death of numerous of these Delawares.

That such deaths occurred and that such were the facts as above stated, is shown by the evidence of the following witnesses: Simon Secondyne (36); John Bullette (41), who shows that at least 150 registered Delawares died before arriving in the Indian Territory; James Wilson (48); (Mary E. Armstrong (57); Mary C. Beysiau (65); Henry Armstrong (72); William Adams (80); John G. Pratt (90–91); Sally O. Smith (97).

If the individual Delawares simply got life estates, why should the total amount contracted for, on the theory of 985 Delawares, be paid, irrespective of the question whether some had previously died?

No sane man would pay out money for a life estate if the person upon whose life the estate depended had already died, and hence the argument is very persuasive that more than life estates was purchased.

B. *The evidence also discloses that the same price was paid on account of old and infirm Delawares on the list as for the young and strong.*

If mere life estates were to be purchased, the price for each estate would depend upon the age of the life tenant. Why, then, did the Delawares pay the same price for lands to be selected by a feeble old man, say of 80, as for a sturdy young man of 20? This can only be explained upon the theory that the tribe was buying an aggregate amount of land. If life estates were being purchased or intended, the price would vary with the age or good health of the life tenant.

Remember, that the *tribal* funds were being used in purchasing; there were no individual funds. If the tribe got indefeasible title, there would be reason why the same price should be paid for all lands; otherwise not.

Another significant fact is this: Under the Delaware

treaty made prior to this agreement, any member of the tribe had an option to sever his connection with the tribe and withdraw from the treasury his proportionate interest in all the Delaware tribal funds (article 9, treaty of July 4, 1866, 14 Stat. 796).

It would have been a very improvident arrangement for an old member of the Delaware tribe, with this privilege of withdrawing funds, to have consented to the payment on his behalf of $160 for a life estate in 160 acres of land, which he might enjoy only for a day or a year or so.

All the surrounding circumstances of the transaction are such that to construe the agreement as merely granting life estates would do violence to common sense as well as to the intention of all parties concerned.

C. *The price paid by the Delawares has an important bearing on this subject.*

We have already referred to this matter before.

Not more than two months before the agreement was made, the principal Cherokee chief, on February 13, 1867, offered to sell to the Government all of the Cherokee lands west of the 96th meridian, some of the lands being really better than those acquired by the Delawares, at 50 cents an acre for lands east of the 99th meridian and 20 cents an acre for lands west of the said meridian (430).

In 1866 the Creeks sold their country west of a certain line to the United States for 30 cents an acre, and the Seminoles sold their country to the United States at 15 cents (Senate Ex. Doc. No. 78, 51st Congress, 1st session, Journeycake case, 155 U. S. 214).

After selling lands to Delawares at $1 an acre, the Cherokees sold lands to the Osage and Kansas Indians just west of the 96th meridian, some of the best lands in the Territory of Oklahoma, by an absolute title, for which a patent was issued, at the price of only 70 cents an acre (474).

In 1879 all of the lands of the Cherokees west of the 96th meridian were appraised by the President at 47.49 cents per acre, with the exception of 230,000 acres sold to the Pawnees at 70 cents an acre (Rec. p. 474). It will be remembered that these lands sold to the Osages not only passed in full title to the Indians, but also passed out of the governmental jurisdiction of the Cherokee Nation. It is not reasonable to suppose that the Delawares were asked to pay $1 an acre for life estates in land over which the government of the Cherokee Nation retained jurisdiction for governmental purposes, and which the Delawares were forbidden to sell except as provided in the constitution and laws of the Nation, when about the same time, or even later, the Nation was selling similar land to other Indians at cheaper prices and entirely free of any claim of right or jurisdiction whatever, either of property in the land or of control over the uses to which it might be put, in the Cherokee Nation.

There are thus several reasons why the contention of the Cherokee Nation that the Delawares bought only a life estate in 160 acres per capita, to be selected within the Cherokee Nation, can not be admitted on any principle of equity, justice, or right.

There is important testimony on this subject. Mrs. Beysiau states that this higher price was paid because the Delawares in addition to the specific lands purchased were to get, by the payment of additional sums of money, general rights in the remaining lands and funds (64).

William Adams testifies to the same effect (59).

Although we have somewhat at large gone into the question of value of surrounding land at the time, we think it such an important matter that we will give further facts with respect thereto.

Letter of February 13, 1867, signed William P. Ross, principal chief, Riley Keyes, and Jesse Bushyhead, Cherokee delegation, addressed to L. V. Bogy, Commissioner of Indian Affairs:

"On behalf of the Cherokee Nation we represent we herewith offer to sell to the Government all of the Cherokee lands lying west of the 96° west, containing eight or nine millions of acres. If taken in a body we would sell all lying between 96° and 99° for fifty cents an acre, and all west of 99° at twenty cents an acre. We would prefer to dispose of the whole amount in a body at a smaller price than to have it picked and culled over" (Rec. p. 430).

Letter May 3, 1899, from Acting Commissioner of Indian Affairs to M. E. Hawley shows:

1. In pursuance of the provision of article 16 of the treaty of July 19, 1866 (14 Stats. 804), the tract of country bounded on the east by the 96° west longitute, on the south and west by the Creek country and the main channel of the Arkansas River, was set apart for the Osage and Kansas Indians, containing 1,566,784 acres, and was paid for to the Cherokees by the Osages at 70 cents per acre. See deed dated June 14, 1883 (22 Stats. 624), which deed is recorded in volume 6 of Indian Deeds, one of the records of the office of Indian Affairs.

2. The total area of Cherokee lands lying west of the Arkansas River originally amounted to 6,574,486.55 acres. On June 23, 1879, in pursuance of the act of 1872 (17 Stats. p. 190) and of the act of 1876 (19 Stats. p. 120) the President appraised the value of that land as follows:

6,344,572.51 acres at 47.49 cents per acre.

230,014.04 acres at 70 cents per acre.

The data furnished by the commission upon which the President fixed the value is found in H. R. Ex. Doc. No. 54, 47th Congress, second session (Rec. p. 474).

3. By the third article of the treaty of June, 1866 (14 Stats. p. 786), the Creeks ceded to the United States the west half of their entire domain, containing 3,402,430.48 acres, for which lands the United States paid at the rate of 30 cents per acre.

4. The Creek Nation ceded to the Seminole Indians a portion of their domain included in certain boundaries in consideration of the moneys set out in their treaty of August 7, 1856 (11 Stats. p. 699).

5. The Seminoles ceded to the United States their entire domain (14 Stats. p. 756), being the same land ceded to them by the Creek treaty of 1856 and the United States ceded to them the tract of land containing 200,000 acres out of the cession made by the Creek treaty of June 14, 1866 (14 Stats. p. 786). The consideration was $325,362 for 2,169,080 acres of Seminole land and the consideration for 200,000 acres ceded to the Seminoles was 50 cents per acre, all of which appears by the treaty of March 21, 1866 (Rec. p. 475).

6. The Choctaw relinquished to the United States all their interests in lands west of 100 degrees west longitude, and the Choctaws together with the Chickasaws *leased* to the United States all that portion of their common territory west of the 98° west longitude, containing about 7,700,000 acres for the *permanent* settlement of the Wichitas and other tribes (11 Stats. 611). The consideration of this relinquishment and lease was $600,000. Later, in 1866 (14 Stats. p. 769), the Chocktaws and Chickasaws, in consideration of $300,000, ceded to the United States the lands leased as above, so that the 7,700,000 acres were first leased for $600,000 and then sold for $300,000, making a total consideration of $900,000, being about 9 cents per acre (Rec. p. 476). Stated in the opinion of the Supreme Court in Cherokee Nation *vs.* Journeycake, 155 U.S. 214, to have been five cents per acre.

Why should it not be held that the Delawares at least got as a tribe a title of occupancy by paying $1 an acre when other tribes secured a fee simple title to similar lands by paying less than $1 per acre?

Land was offered to the Delawares by others than the Cherokees for 30 to 40 cents an acre (William Adams, Rec. p. 80).

Nowhere in the history of the times is there any record of the granting of life interests only to Indians.

Furthermore, we have been unable to find any case where by treaty with the United States or with Indians any Indian tribe granted to a set of individual Indians interests merely for life. We think such a condition of affairs is unknown.

D. *The consideration of what title the Delawares had in Kansas becomes material.* Is it to be supposed that they exchanged a certain and clear title for merely a life estate in the lands which they subsequently bought?

The lands which the Delawares left in Kansas upon removal under the agreement they owned in severalty; they owned them by an indefeasible right (Rec. p. 482).

In the Delaware treaty it was provided that they need not leave their homes in Kansas "*until after they shall have selected and received title to lands for new homes elsewhere.*"

As we shall see, the Delawares never dreamed that they were purchasing life estates for their individual lives. The Delawares entered into the agreement knowing what nature of title they had in Kansas. It is unlikely that they would have consented to the agreement under any circumstances, if merely life estates were intended.

The evidence which we will disclose later shows that heads of families selected lands in Indian Territory, such lands as they thought best for their families; did this as members of the Delaware tribe, and each member went on doing this until the aggregate amount of land was secured. If they had remained in Kansas their wives and children would have inherited, by virtue of the Delaware treaty of 1860, which in article 2 provided that the Secretary of the Interior should makes rules as to Kansas lands in case of death, so that they should be secured to the families of such deceased persons.

The contention of the Cherokees is a strained one. It does violence to the language of the agreement and to the surrounding circumstances. Their argument is improbable in

itself and contrary to the logic of the situation. People do not give something for nothing; old people do not buy life estates, or if they do old people do *not* pay the same price for life estates as do young people.

It is not to be presumed that the Delawares intended, by going to Indian Territory, to spend their tribal funds in buying a worthless or temporary interest in lands, and certainly this could not have been the purpose of the Government.

POINT VII.

The Parole Evidence Which Has Been Taken Is Both Competent and Admissible, Notwithstanding the Objections of the Respondents.

There are two reasons why this is true—

A. In the first place, it is always proper to show concerning a treaty the contemporaneous understanding of the parties and the surrounding circumstances.

B. It is likewise proper in explaining a document to give parole evidence in order to make its provisions clear.

A.

THE PAROLE EVIDENCE WE GAVE TO SHOW THE CONTEMPORANEOUS UNDERSTANDING OF THE PARTIES WITH RESPECT TO THE TREATIES OF 1866 AND AGREEMENT OF 1867 IS UNQUESTIONABLY COMPETENT AND ADMISSIBLE.

Although the agreement was between two Indian nations or tribes, yet they were not equal in education or experience in affairs, or in the conduct of organized government.

The Cherokees for over thirty years had been an established constitutional government, with executive, legislative, and judicial departments. Its representatives were men of education, one a Princeton graduate and able lawyer, another Chief Justice of the Supreme Court of the Nation (309).

On the other hand, the principal chief of the Delawares, Connor, who headed the delegation, *could not write his name, and signed the treaty by a mark.* The Delawares had not had experience in governmental affairs, their form of government being still the ancient patriarchial form of chiefs and councilors, the chiefs holding office by hereditary right.

These facts show a great disparity between the contracting parties, and the Delawares therefore occupied the position of the weaker party, as in cases where Indian tribes negotiate with the United States, and can invoke the rule invoked by Indian tribes when making treaties with the United States.

The rule as established by this court is as follows:

> "The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used in the latter sense. How the words of the treaty *were understood by this unlettered people*, rather than their critical meaning, should form the rule of construction."
>
> Worcester *vs.* Georgia, 6 Pet. 515, opinion by Marshall, Chief Justice.
>
> Choctaw Nation *vs.* United States, 119 U. S. 1.
>
> Jones *vs.* Meehan, 175 U. S. 1.
>
> Wau-pe-man-qua *vs.* Aldrich, 28 Fed. Rep. 489.

The reason for this rule is very clearly and forcibly expressed in Worcester *vs.* Georgia, 6 Pet., star page 551, by Chief Justice Marshall, who said:

> "There is more reason for supposing that the Cherokee chiefs were not very critical judges of language by the fact that every one makes his mark. No chief was capable of signing his name. It is probable the treaty was interpreted to them."

Two of the delegation of the Delawares signed the agreement by mark, one being the head chief; doubtless the rest

followed his leadership. If the treaty did not express what was understood by the Delawares it was the fault of their education and of their inability to read or write.

This point is of great importance as establishing the intellectual advantages of the Cherokee representatives over those representing the Delawares.

> "An Indian treaty, like any other instrument, must be construed in the light of its obvious purpose, and general words may often be limited and restricted by such purpose."
>
> Miami Co. *vs.* Breckenridge, 12 Kans. 114.

In the next point we will discuss the evidence which shows what understanding the Delawares had of the agreement.

One of the Cherokee senators, at the time (Benge, p. 330), shows that at the time both parties understood that full title passed.

In construing the treaty the court will take into consideration the situation of the parties, the property involved, and the *intention and purpose* of the parties, the construction they gave it, and the construction which was adopted and acted upon by the parties.

> United States *vs.* Payne, 8 Fed. Rep. 883.
> Wilson *vs.* Wall, 6 Wallace 83.

Ex-Indian Agent Pratt and other witnesses testified that both parties understood that the Delawares were to own the land outright (53, 54).

It is unquestionably the law that parole evidence is admissible to explain the terms of Indian treaties or the circumstances which surround them.

> Worcester *vs.* City of Georgia, 6 Peters, 515, supra.
> See, also, re Kansas Indians, 5 Wallace, 737, 760.
> Choctaw Nation *vs.* United States, 119 U. S. 1.

B.

IF THE AGREEMENT OF 1867 IS REGARDED AS A DEED, EXTRINSIC EVIDENCE IS STILL COMPETENT, FOR WE DO NOT ATTEMPT TO CONTRADICT IT OR TO VARY ITS TERMS. WE MERELY DESIRE TO EXPLAIN AMBIGUITIES WHICH ARE LATENT IN THE INSTRUMENT. THAT WE HAVE A RIGHT TO DO THIS IS SHOWN BY AN EXAMINATION OF THE AUTHORITIES.

Greenleaf on Evidence, secs. 277, 282.

It has been our endeavor, by the depositions and proofs introduced, to place the court as nearly as possible in the position of the contracting parties, in order that the court may be enabled to accurately interpret the language used in the contract, according to what it was understood to mean and what was intended by the parties.

> "Whatever be the nature of the document under review, the object is to discover the intention of the writer, as evidenced by the words he has used; and in order to do this, the court must put itself in the writer's place and then see how the terms of the instrument affect the property or subject-matter."

Jenkins *vs.* Cooper, 50 Ala. 419.
Swaine *vs.* Vance, 28 Ark. 282.
Brick *vs.* Brick, 98 U. S. 514.
Phelps *vs.* Clasen, 1 Woolw. (U. S.) 204.
Tibbs *vs.* Morris, 44 Barb. (N. Y.) 138.
King *vs.* Merriman, 38 Minn. 47.

POINT VIII.

Extrinsic Evidence, Consisting of Testimony and Documents From Official Records Shows, That the Delawares, Cherokees, and the Government Have Always Understood That Under the Treaties of 1866 and the Agreement of 1867 the Delawares as a Tribe Acquired Clear Title to 157,600 Acres Purchased.

In discussing this evidence we will consider it under several separate heads.

A. *The witnesses who testified* are well qualified to aid the court. They are prominent men or women of the Delawares, who talked with chiefs or representatives of the tribe; are intelligent and clear in their testimony, and one especially, Mr. Benge, was a member of the Cherokee council and one of the signers of the Cherokee treaty.

It is unnecessary to quote from their testimony, but who they are and what their opportunities for knowledge were can be seen by an examination of the record. They are Simon Secondyne (34, 35); John Bullette (39, 40, 42); James Wilson (47, 49); Mary E. Armstrong (52, 56); Mary C. Beysiau (64); Henry Armstrong (80); John G. Pratt, ex-Indian agent (83, 84, 85); Sally O. Smith (95, 96, 97); Sam Houston Benge (330 to 333).

Remember that *all* the Delawares who had personal knowledge of the transactions in Washington, when the agreement was negotiated, are *dead* (see evidence of John Bullette, 43; Mary E. Armstrong, 57; John G. Pratt, 89, 90).

B. *The agreement between the Delawares and the Cherokees was the subject of constant discussion* among the Delawares before, during the time, and after it was negotiated, and especially at the time when the Delawares lived in Kansas. Everyone understood that although some registered Delawares had died, nevertheless, that the tribe, including the heirs of such Delawares, would get the land.

The evidence on this point is quite full (Simon Secondyne, 34–38; John Bullette, 40, 43; James Wilson, 47–50; Mary E. Armstrong, 52–60; Mary Baysiau, Henry Armstrong, William Adams, 64, 69, 78–80; John G. Pratt, 84–92; Sally O. Smith, 95).

The Delawares did not particularly desire to leave Kansas, but were induced to do so upon the promise that they as a tribe would secure permanent homes elsewhere and become citizens in the Cherokee Nation, and in addition as a tribe secure a large body of land.

The Delawares understood that they were to get two things: *First*, citizenship and rights accruing therefrom, and *next*, this large aggregate body of land. Upon the faith of these promises they made the treaty or agreement and removed. They had a chance to buy equally valuable lands elsewhere for less money, but the double proposition was an attractive one (John Bullette, 41, etc.; Mary Armstrong, 53–56; William Adams, 81; John G. Pratt, 92–93).

The Delawares fully believed that deaths of registered Delawares would make no difference.

It is not so infrequent in the history of dealings with Indian tribes that they have been persuaded to do certain things upon definite promises which have not been carried out. We trust that the present case may be an exception.

The Delawares understood and were given to understand that by paying a separate sum of money from their tribal funds at the rate of $1 per acre, the tribe would get an indefeasible title to the land purchased which would belong to the tribe and its varying members, irrespective of the deaths from time to time of such members.

They likewise understood and were given to understand and believed that in addition, by the payment of an additional sum of money they were to secure citizenship rights in the Cherokee Nation, with equal rights as to all remaining lands and funds of the Nation.

They thought they were buying land and also a com-

munal right in the Cherokee Nation (35, 36, 37). They believed they were getting clear title to the lands purchased (4) because of their paying extra money (41, 43, 44); the land was to be their own (47, 48, 53–57, 60, 62). The two transactions, purchase of land and purchase of citizenship, were regarded by them as different and distinct matters (65, 66, 70, 82–83).

The whole history of the negotiations for a treaty and an agreement is well stated by Agent Pratt in his testimony, and his version of the facts agrees with what we contend is the meaning of the agreement (86–88). As Mr. Pratt says about the Delawares:

> "They wanted to be possessed of a home for themselves and their children. They did not want to have it with their lives, but it was to be a continued possession of the Delawares and their children."

Sally O. Smith well states:

> "The Delawares, when so many of them died before the payment was made, did not object to paying $160 for every enrolled Delaware, because they thought when they bought the land and paid for it that their heirs would get it afterwards, and when we paid for the land we thought it was ours" (96, 97).

Mr. Benge, a member of the Cherokee senate at the time, says that selling the land and selling the citizenship were two separate things, and was so understood (330–334).

C. *The official correspondence in the Indian office and other departments bears out our interpretation of the agreement.*

Letter of September 13, 1863, Johnson, Indian agent, to Dole, Commissioner of Indian Affairs.

This letter refers to the anxiety of the Delawares for definite information as to the cession of a part of the Indian Territory:

> "The Delawares wish that portion of the Cherokee country adjoining the State of Kansas, 12 miles wide by 15 long, lying on the Verdigris" (Rec. p. 445).

In a letter of November 30, 1863, to Commissioner Dole, Agent Johnson reported:

> "I am instructed by the Delaware chiefs to inform you that they have visited the Cherokee country with a view of looking out a *new home.* They request me to say to you that they are well pleased with that part of the country which they visited and are willing to accept it as their future home. They desire that the Government *purchase* for them of the Cherokees a tract of country at Caney Creek, commencing at a point on the line dividing the State of Kansas from the Cherokee country, five miles west of said creek, running west with said line 15 miles, thence south 30 miles, thence east 15 miles, thence north 30 miles to the place of beginning.
>
> "At the time of their visit they could not purchase land as there was no authorized power in the Cherokee Nation to make treaties or to dispose of any part of their lands. Having full faith and confidence in the ability and justice of the United States, they desire that the Government purchase for them the tract of country designated and will be satisfied with the *purchase* made in their behalf" (Rec. p. 445).

In another letter of November 30, 1863, to Commissioner Dole, Agent Johnson stated that:

> "The country selected is about 20 miles west of the Verdigris, and is very desirable (Rec. p. 445). Should the Department consider the amount of land too large, I think the Delawares will be satisfied with the amount of land that you may designate, and I think will be satisfied with a reservation 10 by 20 miles in size" (Rec. p. 446). (This would be 120,000 acres.)

Letter of March 10, 1864, to Commissioner Dole. Agent Johnson has this to say:

> "On the 30th of November I wrote to the Department, *at the request of the chief,* desiring you to *pur-*

> *chase* a portion of the country for them. . . . The Delawares are willing to make a treaty provided they have a country secured to remove to. . . . Delaware lands are the most desirable of any in Kansas and are daily increasing in value" (Rec. p. 451).

And in a letter of March 21, 1864, he wrote Commissioner Dole as follows:

> "I am requested by the chiefs of the Delaware tribe of Indians to inform you that they received your letter stating that John Ross, head chief of the Cherokees, will shortly visit the Delawares in Kansas on his way home to the Indian country, and that the Delawares will be enabled to *purchase* land of the Cherokees" (Rec. p. 451).

August 25, 1866, Thomas Murphy, superintendent of Indian Affairs, wrote to Hon. D. N. Cooley, Commissioner of Indian Affairs and said:

> "I have the honor herewith to transmit a letter from Agent Pratt of the 21st inst. enclosing a letter from the Delaware chiefs asking when they will be permitted to select a home for their people. . . . I beg leave to call your attention to this subject and again recommend that a delegation of the Delawares may be permitted to visit the southern country at an early date to select suitable homes for their people" (Rec. p. 453).

August 17, 1866, John Connor, principal chief, and Charles Journeycake, assistant chief, of the Delawares, wrote to John G. Pratt, United States Indian agent in Kansas, saying that:

> "We wish to know through you from the superintendent where we are to seek a new home for our people" (Rec. p. 454).

August 14, 1867, Thomas Murphy, superintendent Indian Affairs, wrote Hon. C. E. Mix, Acting Commissioner Indian Affairs, and said:

"As it is the particular desire of these Indians (Delawares) to remove to their *new homes* in the Cherokee country the coming fall, I respectfully request the department will, without delay, take the necessary steps," etc. (Rec. p. 480).

August 6, 1867, Mr. Pratt, Indian agent, wrote to Thomas Murphy, superintendent of Indian Affairs in Kansas, which was enclosed with the preceding letter, and which is an explanatory report on the book which is the registry of the Delaware Indians. This report described the register mentioned as giving, among other things, the names of the Delawares—

1. "Who has elected to remove from their present homes and vacate their lands in Kansas, together with a description of the same, the valuation thereof and the valuation of the improvements."

Note that Pratt refers to the lands which the Indians held in Kansas in severalty as "their present homes" (Rec. p. 481).

2. A statement of the Delaware Indians, deceased, who belonged to the families of the removing class (Rec. p. 482).

3. A list of those who belonged to the citizen class (Rec. p. 482).

4. A description and value of the unallotted tracts and the improvements.

5. A list of the persons who originally elected to become citizens, and references to those who have since elected to remove with the tribe.

6. A condensed table noting the number of acres, the valuation thereof, and the valuation of the improvements on the Delaware diminished reserve (Rec. p. 483).

In other words, Agent Pratt, in his statement, itemizes the value of the old homes of the Delawares and all that they contain, giving an inventory of all their possessions, which, it has been seen, they hold in severalty with the right to dispose of in the open market. He ends up his letter as follows:

> "The chiefs and councilors are very anxious to remove to their *new homes* this fall, so that during the winter they can be building houses and preparing fields to till next year" (Rec. p. 483).

Thus, it is seen that the Indian agent, the mouthpiece of the Delaware Indians, considered their title in the place to which they were to remove no different from their tenure of land in Kansas. One was an old home and the other was a new home.

A paper called Exhibit C, marked "Delaware M. 1277," is a credential furnished to the Delaware delegates, dated October 13, 1866, signed by John G. Pratt, United States Indian agent. A part of it reads as follows:

> "Now, therefore, in accordance therewith I do hereby certify on honor that at a council of said Delawares held at this office on the 13th day of October, A. D. 1866, it was determined by said council that the following persons were and are fully authorized to act for and on behalf of said tribe, to wit:
>
> "Captain John Connor; principal chief, Captain Sarcoxie, Charles Journeycake, assistant chiefs, by Joseph Armstrong (substitute), Andrew Miller, councillors; Isaac Johycake (Journeycake), United States interpreter. And that they have full, ample and complete authority to select and secure *new homes* in the Indian country for said tribe" (Rec. p. 465).

Letter of February 13, 1868, from Thomas Murphy, superintendent of Indian Affairs, to N. G. Taylor, Commissioner.

This letter transmits Agent Pratt's report and exhibits, which—

> "Contain a complete history relative to the procuring of a new home for the Delawares in the Indian country and their removal thereto, and I have only to add that I am familiar with these transactions and that the statements contained in the agent's report are in the main correct" (Rec. p. 460).

Pratt's report condensed is as follows:

On the 1st of September, 1866, D. N. Cooley, then Commissioner of Indian Affairs, directed that a delegation of Delaware Indians be permitted to proceed south for the purpose of selecting new homes in the Indian country south of the State of Kansas. They held a council at my office on October 14, and appointed a committee. The delegation, with a large number of other Delawares, about October 22, 1866, proceeded south for the purpose of selecting a *new home* for their people. With their people and two commissioners appointed by the Cherokees, they explored the Cherokee country west of the 96th meridian and decided that there was not sufficient good land there to meet the wants of the people. They, thereupon, *preserving their tribal organization*, selected *for their future home* that portion of the Little Verdigris country commencing at the Kansas State line where the 96th meridian crosses the same; thence east ten miles; thence south thirty miles; thence west ten miles; thence north thirty miles to the place of beginning. It will be seen that the selection of *their future homes* was east of the 96th degree of longitude (Rec. p. 461). The people appeared to be satisfied with the exploration and selection of their new home. A number of regular councils had also been held and the whole matter looked into in every aspect (Rec. p. 462).

> "In conclusion I beg leave to state that at this time four-fifths of the Delaware Indians have left this reserve and are now in the Cherokee country or en route for it, designing to make their new homes there in accordance with the agreement entered into with the Cherokees, of whom some have already purchased farms and have made arrangements to cultivate the same" (Rec. 463).

Attached to Pratt's report there is a paper marked "Exhibit A," which is a letter dated September 1, 1866, written by Hon. D. N. Cooley, Commissioner, to Thomas Murphy, superintendent of Indian Affairs, at Atchison, Kans. The following extracts are noteworthy:

> "When under the provisions of the Delaware treaty of July 4, 1866, copies of which are herewith enclosed, it is contemplated that the Indians may select for themselves, with the approval of the Department, a new location in the Indian country south of Kansas, amounting to 160 acres, if they wish for so much, for each person who will remove" (Rec. p. 463).

(Note that the words "new location" are used. Phrases of this kind would give the Indian the impression that his new home would be held by him in the same manner as his old home in Kansas. He wasn't told that he would have a place of residence. On the contrary, words and phrases were used which led him to believe that he would have in the Indian Territory just what he had left in Kansas, except that it would be new to take the place of old.)

There is a paper marked "Exhibit B," which accompanies Pratt's report. It is a letter dated October 13, 1866, signed John G. Pratt, Indian agent, addressed to—

Captain John Connor, Head Chief.

Captain Sarcoxie, } Assistant Chiefs, unable to go.
Charles Journeycake, }

Joseph Armstrong, } Councillors.
Andrew Miller, }

Isaac Journeycake, U. S. Int'r, Delegation.

This letter commences as follows:

> "I am directed by the Hon. D. N. Cooley, Commissioner of Indian Affairs, under date of September 1, 1866, to furnish you with such instructions and information as will enable you to proceed south and select for your tribe a new reserve in the country. For your information all these lands in the Indian country which are open for settlement and selection, together with a map thereof, and also a copy of your treaty, as well as that of the Cherokees, are herewith furnished you for your guide, and you may select lands in quantities of 80 or 160 acres, as you may deem wise" (Rec. p. 464).

(Note that the reserve is called a "new reserve," thus in-

timating that they will get in the new country the equivalent of what they left in the old; and note that they are told that they may select such lands as they may desire. It is natural to assume that when these delegates returned to their nation they spoke of the country which they were going to have as a new home which would belong to them and their children forever, thus verifying the testimony which we have taken.)

D. *Not only did the Delawares think that they acquired these particular lands by good title, but they acted upon this assumption;* they occupied and improved them. These contemporaneous acts are important to be considered in construing the document.

The evidence is quite full on this point, and shows that the Delawares arrived in the Indian Territory, selected farms, made improvements, expended large sums of money, and that they and their descendants have lived on these farms ever since; some of the improvements on each of the tracts have cost from $6,000 to $8,000, more or less.

If a registered Delaware believed that he merely would get a right for his own life, it is not reasonable to suppose he would have made these valuable improvements, his tenure being so uncertain.

See record, pages 36, 37, 43, 46, 48, 57, 65, 66, 67, 71, 72, 75, 76, 80, 98.

Whatever the *present* officers of the Government may think is the meaning of the treaty, it is evident that about the *time* of the treaty or agreement the Government was of the opinion that the Delawares had secured good title to these lands.

In the annual report of the Commissioner of Indian Affairs for 1869, pages 502, 503, it is stated as follows (of which this court will take judicial notice):

"SALE OF CHEROKEE LANDS TO DELAWARES.

"The 15th article of a treaty between the United States and the Cherokee Nation, ratified August 11,

1866, provided certain conditions, or terms, upon which friendly Indians might be settled upon unoccupied lands in the Cherokee country east of the line of 96° of west longitude, the price to be agreed upon between said tribes, subject to the approval of the President of the United States.

"And a treaty having been made with the Delaware tribe, ratified August 10, 1866, providing for their removal to certain land to be ceded to the United States by the Cherokees, which was not ceded to the United States, an agreement was made between the Cherokee and Delaware Indians on the 8th of April, 1867, which has since been approved by the President, by which the Cherokees *sold 157,600 acres to the said Delawares at $1 per acre*, in payment for which the Delawares transferred to the Cherokees certain bonds held in trust by the Secretary of the Interior, said Delawares becoming a part of the Cherokee Nation, and by other terms of the contract transferring their pro rata shares of certain other stocks held in trust by the Secretary of the Interior, to the credit of the Cherokee Nation.

"See report of changes in Indian trust fund of this date."

While the court does not take judicial notice of the ordinary records and files of an executive department, the court will, however, take judicial notice of public acts of an executive department printed in public documents either by the department or one of the houses of Congress. See—

Jones *vs.* United States, 137 U. S. 202–214.

New York Indians *vs.* United States, 170 U. S. 1, 32.

E. As the Delawares moved and *selected* and *occupied* lands and *improved* them, relying upon the agreement, it is now too late for the Cherokees to minimize the Delawares' title, especially as the Delawares have changed their position, relying upon the faith of the Cherokee Nation and the treaties and the agreement.

We have already referred to some of the evidence relative to the selection, occupation, and improvement of lands.

Horace M. Adams, in his deposition, testifies to the location of the 157,600 acres selected, which he describes by legal subdivisions, as in possession of the Delawares (338, etc.).

An examination of the record between pages 36 and 98 will substantiate the matters above stated. The precise lands selected are shown in 87 separate exhibits, introduced in connection with the said testimony of Mr. Adams.

The improvements have been very extensive.

Mr. Horace M. Adams has personally examined all of these lands and marked them upon Government plats, and the various exhibits offered in evidence by Mr. Adams were authenticated or prepared by a Mr. Berthrong, employed in the General Land Office (see Rec. pp. 338–424, etc.).

Mr. Adams has visited all of the land in question (344, 386, 387).

F. *There is a well-recognized principle* of law that where a man who has or claims certain rights stands silent and allows another to enter upon land in the belief that he has some right or title, and to make improvements, we say there is a principle of law, which is often invoked, to estop such person from taking any action inconsistent with his previous acquiescence. We invoke this principle also, and all the more strongly inasmuch as our clients, as we have shown, were Indians who, in knowledge and experience, were not on an equality with the other contracting parties, the Cherokees. From what has been said we believe that we have shown to the court that there is a body of land in the Cherokee Nation, consisting in all of 157,600 acres, which is not contiguous and which consists of isolated and well-recognized plots, all of which is in the occupation of Delawares, some of whom, to the extent of 212 in number, are Delawares who were upon the original roll, and the remainder, amounting in all to about 868, are either heirs, children, or descendants of Delawares who were upon such original roll, whether dead or living. We think we have

also established the proposition that all of this body of land is the absolute and indefeasible property of such Delawares.

Under the treaty of 1866 this land as a whole is subject to allotment among the individual Delawares. To be sure, individual Delawares have occupied it in severalty. Doubtless when the Delaware council acts the individual Delawares occupying lands will get such lands or the matter will be one of mutual adjustment. We are not so much concerned with that proposition at present. The important thing, however, is to establish, as we think we have done, that this whole body of land has forever been cut out of the Cherokee lands and is the indefeasible property of our clients.

While it may be true that so long as the Cherokee Nation maintains its government these lands may be called a part of the Cherokee Nation for the purpose of government, still they are not a part of the property of the Cherokee Nation as such.

Furthermore, remember that not only in the Journeycake litigation, but also in other ways, the Cherokees for many years have admitted the Delaware title. They refer to the lands as lands purchased. (See letter of January 25, 1869, from the principal chief of the Cherokee Nation, Rec. p. 431; letter of March 14, 1874, from the treasurer of Cherokee Nation, Rec. pp. 455, 556).

See also letter dated June 19, 1890, from the delegates of the Cherokee Nation to the Committee on Indian Affairs, which contains a statement—

> "As has been seen, the Delawares purchased 157,600 acres of Cherokee lands lying east of the 96th degree. *That was an* absolute and unconditional purchase, and in which land the Cherokee Nation has no title or interest."
>
> Journeycake *vs.* Cherokee Nation and United States, 28 Court of Claims, 309.

POINT IX.

Treaties With the Delawares Prior to 1866 Show Not Only that the Delawares Were Guaranteed Protection, but Also that it Had Been Customary for Them Both to Sell and to Buy Landed Interest With the Approval and Acquiescence of the United States.

It is not to be presumed that all of a sudden in 1866 and 1867 an entirely new Indian estate in land was created for themselves, namely, estates for life in severalty, to the individual members of the tribe.

It is fair to presume that the Government's policy in regard to Indian titles had not changed. It is fair to presume that in making the agreement of 1867 it was made in the light of prior treaties, and that neither party or the Government for a moment imagined or thought of anything like a life estate.

Before moving to Indian Territory the Delawares for years had permanent homes; had had title by occupancy; communal rights in the tribe. Hence, a brief history of what prior treaties provided is instructive to aid in the interpretation of the Delaware-Cherokee agreement.

1. Delaware treaty of 1778 (7 Stats. 13):

United States guarantees to defend Nation of Delawares and their heirs in all their territorial rights.

2. Delaware treaty of 1785 (7 Stats. 16):

Establishes *boundaries* between the United States lands and those of the Delawares.

3. Delaware treaty of January 9, 1789:

Confirms peace and friendship.

4. Delaware treaty of 1795 (7 Stats. 49):

In this the Delawares *cede* land and Delawares describe their possessions as "their country" and the United States relinquishes its rights in certain lands.

5. Delaware treaty of 1803 (7 Stats. 74):

Defines boundaries; *cedes* lands to the United States; provides for *exchange* of lands.

6. Delaware treaty of 1804 (7 Stats. 81):

Refers to Delaware land as "the country they possess." The treaty was negotiated by a commissioner plenipotentiary, thus recognizing the fact that the Delawares were an independent nation or tribe.

This treaty cedes the Delawares' right and title to certain country and recognizes the right of the Delawares to certain lands as follows:

> "The said tribe having exhibited to the above named commissioner of the United States sufficient proof of their right to all the country *which lies between the Ohio and White Rivers*, &c. . . . the said United States will in future consider the Delawares as the *rightful owners* of all the country, &c."

This shows that the Delawares were considered as *owners* in their tribal relation of certain lands. This is the highest kind of an Indian title, whether it is a fee or merely a communal right of occupancy. It certainly is an exclusive title.

7. Delaware treaty of 1805 (7 Stats. 87):

Contains a *cession* of certain lands.

8. Delaware treaty of 1805 (7 Stats. 91):

In regard to the right to *cede* certain lands.

9. Delaware treaty of 1809 (7 Stats. 113):

Provides for a *cession* of lands by Delawares.

10. Delaware treaty of 1817 (7 Stats. 160):

Agreement as to *cession* of certain lands.

11. Delaware treaty of 1818 (7 Stats. 188):

Delawares *cede* Indians lands. United States agrees to provide Delawares—

> "a country to reside in upon the west side of the Mississippi and to guarantee to them peaceable possession of the same."

While under this treaty they moved to Kansas and merely secured a country to reside in, the fact is that when they got

to Kansas they acquired a communal title of occupancy; a firm title to these Kansas lands, which they gave up when they moved to Indian Territory.

Words used in Indian treaties of such general significance must be construed to mean the same kind of title as the Indians theretofore had.

12. Delaware treaty of 1829 (7 Stats. 327):

This recites the treaty of 1818, whereby the Delawares were to get "a country to reside in west of the Mississippi as a permant residence of their Nation" and the United States—

> "pledges the faith of the Government to guarantee to the said Delaware Nation forever the quiet and peaceable possession and undisputed enjoyment of the same against the claims and assaults of all and every people whatever."

13. Delaware treaty of 1832 (7 Stats. 397):

Provides for *cession* of lands.

14. Delaware treaty of 1854 (10 Stats. 1048):

Delawares *cede* lands. President upon request will "cause the country reserved for their *permanent* home to be surveyed," etc.

15. Delaware treaty of 1860 (12 Stats. 1129):

Provides for surveys and allotment in severalty of 80 acres each, which tracts shall not be alienated except to the United States or other Delawares.

It is to be observed that the *restriction* upon *alienation* did not impair the *title* of the Delawares to the tracts.

16. Delaware treaty of 1861 (12 Stats. 1177):

Provides for *sale* of surplus lands of Delawares in Kansas, and *that individual allotments should go to the family or heirs.*

In view of these treaties, is it not fair to presume that all parties intended that the Delaware Nation, *when moving to the Indian Territory*, should get a firm and undisputed title

to the lands which they purchased, in addition to the purchase of citizenship rights?

How can it be argued that all of a sudden the Government invented a new estate for individual Indians, merely an estate for life?

The Delawares have always been worthy of consideration by the Government, and have been loyal to the Government ever since the time when William Penn, in 1681, secured the charter for Pennsylvania. The Delawares concluded a treaty with him in 1682 and granted him vast tracts of country. It was with the Delawares that the colonists, after the Declaration of Independence, made their first treaty as between Nation and Nation, dated September 17, 1778, wherein all the territorial rights of the Delawares were guaranteed protection. In the war of 1812 the Delawares opposed the great Shawnee chief, Tecumseh, and stood by the Government.

In 1829 the allegiance of the Delawares was tried when, at the dictation of the United States, they were forced to give up some 5,000,000 acres of land in exchange for a little over 800,000 acres in Kansas, in the far western country, whereby they were forced to leave some of the most fertile valleys of Indiana, and yet they still continued loyal. During the Civil War they were loyal to the Government.

There was ample reason why the Government in 1866 should declare that they need not move from Kansas until they had obtained *title* elsewhere to lands, and yet when they moved to Indian Territory they found the Cherokees had taken up all available land which had been selected (501).

During the Civil War it appears from the official reports of the agent and Commissioner of Indian Affairs that the Delawares were always faithful allies and furnished large numbers of troops.

"The Delawares are truly a loyal people," etc. (Agent Johnson's report, September 17, 1862.)

> "Of 201 Delawares between the ages of 18 and 45, 170 have volunteered and are now in the military service of the United States." (Annual report of Commissioner of Indian Affairs, 1862, p. 23.)

Their services can be seen in the following reports: Agent Johnson, September 25, 1863; Annual Report Commissioner of Indian Affairs, 1863, p. 29; Report of Agent Pratt, September 13, 1864; Annual Report Commissioner of Indian Affairs, 1864, p. 37; Report of Agent Pratt, September 25, 1865; Annual Report Commissioner of Indian Affairs, 1865, p. 43.

Is it not reasonable, therefore, to suppose that the United States intended to keep its pledges and to guarantee the Delawares good title and protection in their permanent home? What logic or reason is there in the view that all of a sudden it was proper that they should get a worthless and uncertain title?

POINT X.

Under the Second Portion of the Delaware-Cherokee Agreement There is no Question That the Delawares Acquired for Themselves and Their Children all the Rights and Immunities of Native Cherokees, Including a Right to Participate Pro Rata in the Remaining Lands and in All the Communal Funds of the Nation.

This proposition requires but little discussion. The Journeycake case is an authority for it.

From what has been said it is evident that the Delawares must first receive the 157,600 acres, and that thereafter on allotment must receive an additional amount of land equally with all other Cherokees. If they are to receive their share according to the ratio of 1 to 13.78, which existed when the agreement was made, it would seem to be within the spirit and letter of that agreement. If justice is

to be done their shares should not be cut down by the improper increase in the number of Cherokee citizens or by reason of the waste of Cherokee funds. These matters will be considered briefly hereafter.

The decree in the Journeycake case of May 22, 1893, declared the rights of the Delawares in the common property of the Cherokee Nation, and this decree enjoined the Cherokees and the United States—

> "from making any discrimination between Cherokee citizens of Cherokee blood or parentage and Cherokee citizens of Delaware blood or parentage to the injury or prejudice of the latter."

It appears that the question as to rights of Cherokee citizens by intermarriage, etc., has never been passed on.

It will be remembered that when the census was taken in 1866, it appeared there were 13,566 Cherokees and 985 Delawares, establishing a ratio as computed by the Interior Department of 1 to 13.78 (499, 432).

It was upon this basis that the Delawares bought their citizenship rights, and it would seem that upon this basis they should share in the property they bought. The increase in the number of citizens of the Nation is naturally a detriment to the Delawares, unless, as in the case of the Shawnees, these new citizens paid into the common fund their proportionate share.

Remember also that 200 Registered Delawares died before removal. They of course could not have participated in the benefits arising from the common property, although there was paid for them $24,600. This could only have been on the theory that the ratio in which the Delaware tribe should share in the remaining Cherokee lands and funds would be a fixed one, as otherwise the deaths of 200 members of the tribe ought to have been considered, and less money should have been paid. The Delawares were not allowed to increase the number of Registered Delawares under the agree-

ment of 1867, except in a particular way. Why should not the Cherokees be under a like inability to increase the number of their tribe or Nation?

However this may be, it would seem no more than fair that the Delawares should not be forced to share in the communal funds and lands of the Cherokee Nation with persons admitted as citizens who never have contributed to that common fund.

The court below held that the Cherokee Nation had a right to admit citizens; that the Delawares could not complain. If this argument is carried to its logical end, it would mean that the Cherokees might admit as citizens the whole population of the United States, and thereby cut down the share of each Delaware to an infinitesimal amount. We will consider the question of unlawful admission of citizenship in the next point.

POINT XI.

The Cherokee Nation Have No Power by the Admission of Citizens Who Did Not Contribute to the Common Fund to Cut Down the Property Rights of the Delawares in That Fund. This Would be Confiscation, and Whatever May be the Political Rights of These New Citizens They Can Not be Considered as Entitled to Share With the Delawares in the Funds and Remaining Lands of the Nation.

Numerous persons were adopted as citizens since the making of the Delaware-Cherokee agreement. It is evident that they may be citizens without having property rights.

Stevens *vs.* Cherokee Nation, 174 U. S. 488.

In article 5 of the Cherokee treaty of 1835 (7 Stats. 478), under which the Cherokee Nation has always exercised its rights of self-government, it appears that the Cherokees

were granted power to legislate in regard to their country which belonged to them or such persons as "have connected themselves with them." This did not refer to persons who might thereafter come in, and hence the Cherokee Nation was not authorized *expressly* to admit new citizens.

This court has jurisdiction to determine what the rights of the Delawares are, and naturally to determine the extent of those rights, and who shall share in the Cherokee lands and funds.

If other persons can share who are not authorized, the result will be an unfortunate one for the Delawares.

In 1886 the Commissioner of Indian Affairs (p. viii) in his annual report stated that the allotment of Cherokee lands in severalty to all citizens would give each one 228 acres.

It is estimated now that such an allotment would give each only 140 acres; thus in a few years the communal interests of Delawares were reduced by 88 acres.

While the 5th article of the treaty of 1835 did not either grant or deny the right of Cherokees to admit persons to citizenship, still evidently any such admission of citizens must be a political right merely. If the admission of new citizens gave to them rights of property injurious to those of the Delawares, this would be unconstitutional and void, for the said Cherokee treaty contains a proviso that the power of the Government or the acts done under that power—

> "shall not be inconsistent with the Contstitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with Indians."

At the time of the treaty one of the laws of Congress was section 12 of the act of June 30, 1834 (4 Stats. 730), which provided—

> "that no purchase, grant, lease, or other conveyance of land or of any title or claim thereto from any Indian nation or tribe of Indians shall be of any validity in law or equity unless the same be made

by treaty or convention entered into pursuant to the Constitution."

It can not be gainsaid that the granting by the Cherokee Nation of rights of citizenship to persons who did not contribute to the Cherokee funds, which rights were to include a right to participate in the funds, took away property from the Delawares without due process of law.

It can not be gainsaid that the conferring by the Cherokee Nation of rights to property in land upon such citizens would be a grant which was not made by treaty.

It would seem, therefore, to follow that no matter what might be the political power of the Cherokee Nation, they had no power under the United States Constitution to deprive the Delawares of their property or to make a grant of their lands except by treaty.

POINT XII.

Furthermore, it is Claimed by the Cherokee Nation that it Had a Right to Admit New Citizens to Property Rights Because of Some Amendments to its Constitution.

These amendments were void, as well as any action taken under them. They will be referred to hereafter. They were void because ratified at a mass meeting at which but few attended, and which was convened after a very short and entirely illegal and irregular notice.

A. *The amendments were irregularly adopted.*

It is in evidence that the meeting at which the amendments were adopted was convened after notice of only one or two weeks, and only about 300 persons out of a population of 13,000 were present. The amendments were carried by a *viva voce* vote, an illegal method; no proclamations were issued, as required by the constitution; no six months' notice, as required by the constitution (see record, 421–422, 419) and see stipulation that four other citizens, in ad-

dition to Muskrat and Meigs, would testify to the same effect (423).

We make no collateral attack upon the Cherokee constitution. This is a point raised directly in a litigation where the Cherokee Nation is a party.

B. *Who were the persons thus illegally admitted?*

1. *The North Carolina Cherokees.*

They paid nothing. They had remained East when the main body of the Cherokees moved West. They had severed their connection with the tribe and were paid for their interest in tribal property and became citizens of the States.

Cherokee Trust Fund Case, 117 U. S. 288.

According to the foregoing decision such Cherokees lost their rights of citizenship, and their interest in the property of the Nation had been paid to them. They had, therefore, no longer any right to claim a share in Cherokee property by reason of birth or otherwise.

If the Nation desires to admit them as citizens having political rights we do not object. They could not acquire, to the detriment of the Delawares, property rights. They had lost their rights of citizenship, and could not, therefore, be said to come within the jurisdiction of persons formerly citizens, as was intended in section 2, article 1, of the constitution of the Nation, wherein it is provided—

> "Whenever any citizen shall remove, with his effects, out of this Nation and become a citizen of any other government, all his rights and privileges as a citizen of this Nation shall cease: Provided, nevertheless, that the national council shall have power to readmit by law to all the rights of citizenship any such person or persons who may at any time desire to return to the Nation on memorializing the national council for such readmission."

Persons intended to be benefited by this provision were citizens as of the time when the constitution was adopted

but the North Carolina Cherokees had separated under the treaty of 1835. They had never been citizens in the Nation when it lived west, hence they were illegally admitted, even under the constitution.

The attention of the court is invited to complainant's Exhibit S, especially the act of union contained on pages 7 and 8 of said exhibit, as showing the conditions on which the eastern Cherokees were to be admitted and enjoy the privileges of citizenship in the Cherokee Nation. It will be observed that by that act of union it was provided that all of the public lands of the Cherokee Nation, east or west—

> "with all other public interests which may have vested in either branch of the Cherokee family, whether inherited from our fathers or derived from any other source, shall henceforward vest entire and unimpaired in the Cherokee Nation, as constituted by this union."

By this agreement between the eastern and western Cherokees every eastern Cherokee who is permitted to enjoy the benefits of citizenship in the Cherokee Nation must relinquish all his separate right in the property belonging to the eastern Cherokee Indians, for the benefit of the citizens of the Cherokee Nation, as formed by this union.

Complainants have alleged in their petition that the Cherokee Nation is claiming and entitled to larger sums of money from the United States on account of the failure of the Government to carry out its treaty obligations, but the attention of the court is invited to the fact that there is now pending in Congress and in this court, by reference from Congress, a claim of the eastern Cherokees, both those residing in the Cherokee Nation and those residing in North Carolina and elsewhere in the east, whereby said eastern Cherokees claim against the United States in separate right a large sum of money, amounting to $1,100,000, with interest from July 12, 1835.

By this claim of the eastern Cherokees it will be seen that

eastern Cherokees who have been admitted to citizenship in the Cherokee Nation by acts of council, which have been erroneously described as "readmissions," now refuse to recognize the right of the Nation to their separate property, and are claiming it as against the Nation as well as against the United States. This applies to those eastern Cherokees who are citizens of the Nation under the act of union referred to. And the claim is made notwithstanding their agreement that all of their public interests shall be vested entire and unimpaired in the Cherokee Nation, as constituted by such act of union.

The Delawares urge that, should this claim be paid, it should be paid to the Cherokee Nation, and that they should participate in the benefits thereof.

It is evident, then, that the admission of the North Caroline Cherokees is injurious and detrimental to the Delawares.

2. *The admission of other persons not of Cherokee blood.*

Complainant's Exhibits K and L show that many persons not of Cherokee blood have been admitted by act of council.

The property of the Nation is common property; the Delawares acquired interests by treaty and have paid their pro rata share. These new citizens have paid nothing. The Cherokee treaty of 1846 provides that the Cherokee lands shall be secured "to the whole Cherokee people for their common use and benefit."

What right, then, has the Nation, in defiance of treaty obligations, to pass acts which in effect confiscate property?

3. *Various white or intermarried citizens have been illegally admitted.*

This can be observed by examining the complainant's Exhibit S (297, etc.). This exhibit is not printed in full, but contains the laws of the Cherokee Nation and of legislation in regard to intermarriage. It appears that citizenship is

not granted directly to intermarried whites. At section 665 there is the phrase "adopted citizens of the Cherokee Nation by marriage" etc., and section 666 provides in regard to the rights of persons intermarrying.

Taking these expressions in the intermarriage law in connection with complainant's Exhibit K, showing how many of these people are enrolled as citizens, being intermarried whites, it is evident that the intermarried whites claim rights of property. Whether they do this or not, the court should state, in determining the rights of the Delawares, whether or not they can share in the common property. There is no question that these white citizens do claim such rights.

Congress by legislation, construed by this court in Stephens *vs.* Cherokee Nation, 174 U. S. 488, seems to recognize the fact that there might be citizens of the Cherokee Nation who are not entitled to property rights. This court says:

> "It may be remarked that the legislation seems to recognize, especially the act of June 28, 1898, a distinction between admission to citizenship merely and the distribution of property to be subsequently made, as if there might be circumstances under which the right to a share in the latter would not necessarily follow from the concession of the former."

These white citizens and others admitted have merely political rights.

C. *The amended Cherokee constitution is invalid.*

The Cherokee council claim this right to admit persons to citizenship under provisions of the amended constitution; that is, under provisions of what is printed in the laws of the Cherokee Nation as amendments to the constitution, especially the provisions of section 5 of said alleged amendments, as follows:

> "All native born Cherokees, all Indians and white persons legally members of the Nation by adoption,

> all freedmen who have been liberated by voluntary act of their former owners, as well as free colored persons who were in the country at the commencement of the rebellion, and are now resident therein or who may return within six months from the 19th day of July, 1866, and their descendants, who reside within the limits of the Cherokee Nation, shall be taken and deemed to be citizens of the Cherokee Nation."

The question whether or not the words "all Indians and whites legally members of the Nation by adoption" conferred upon the national council the power to adopt Indians or whites, if valid, need not here be discussed further than to say that it is very doubtful whether these words could be so construed as to confer that power on the Cherokee council. A more serious question is the validity of the so-called amendments themselves. The constitution of the Cherokee Nation provides for the amendment thereof, in article 6, section 10, as follows:

> "The national council may propose such amendments to this constitution as two-thirds of each branch may deem expedient, and the principal chief shall issue a proclamation directing all civil officers of the several districts to promulgate the same as extensively as possible within their respective districts at least six months previous to the next general election; and if, at the first session of the national council, after such general election, two-thirds of each branch shall, by ayes and noes, ratify such proposed amendments, they shall be valid to all intents and purposes as parts of this constitution: *Provided*, that such proposed amendments shall be read on three several days in each branch, as well when the same are proposed as when they are ratified" (Rec. p. 305).

It is not necessary to look further than the alleged amendments themselves, as proclaimed by the principal chief of the Cherokee Nation (page 307 of the record) to see that this provision was not followed in their adoption. It will be

seen there that the requirements of the constitution for its amendment were not only not complied with, but that there was absolutely no attempt to comply therewith. The so-called amendments were proposed in the council of the Cherokee Nation between the dates of July 19, 1866, and November 26, 1866, covering a period of four months. This is shown on the face of the record itself, so far as the amendments may show it; but as a matter of fact, said amendments were proposed some time during October, 1866 (Rec. pp. 417–421. Depositions of Henry C. Meigs and David Muskrat).

According to the constitution, said amendments should have been proclaimed for six months prior to the next general election of council, so that the people might know what was proposed, and a campaign might be carried on and a new council elected, which new council might again take up and pass on said amendments before they should become operative as part of the constitution of the Cherokee Nation. It might be thought that as a matter of fact these amendments were passed on by all of the Cherokee people, as the proclamation recites that they were approved of at a general convention of the people on the 28th day of November, 1866. The fact is, however, that after about two or three weeks' notice these amendments to the constitution were considered at a mass meeting of a few people, consisting of about 300 men and some women and children, altogether about 1,000 persons, who met together in the court house square in Tahlequah on the 26th day of November; had read to them these proposed amendments, which were declared to be adopted by the convention (see depositions of Meigs and Muskrat, Rec. p. 417, *et seq.*, and stipulation between the parties that Doc. Cunningham, Daniel Gritts, Joab Scales, and Houston Benge, all native Cherokees, and men of reputation, would testify to the same effect as Meigs and Muskrat on this question).

Taking the so-called amendments to the constitution as

they appear in the light of depositions introduced on behalf of complainants, it will be very clearly seen that said amendments not only were not adopted in accordance with the provisions of the constitution of the Cherokee Nation relating to amending the same, but that they never received the sanction of any considerable number of the citizens of the Cherokee Nation such as entitled them to respect. The total citizenship of the Cherokee Nation at that time was over 13,000 and there were present at this meeting only about 300 of the qualified electors of the Nation. And these only voted on the amendment, if they voted at all, by mere silence or some sign of assent to what the leaders presenting the amendments were saying.

This is not a collateral attack on the Cherokee Nation, but is a direct attack in a litigation directly with that Nation. It is necessary to determine this question so as to ascertain what amount or share the Delawares will have in the communal funds of the Cherokee Nation.

The position we have taken is sustained by an important authority.

D. *Ainsley* vs. *Ainsworth, decided in the United States Court of Appeals for the Central District of Indian Territory*, 69 S. W. Rep. 884, Sept. 25, 1902.

The court held that the Choctaw Nation could not by a constitutional provision give to some of its citizens an irrevocable license to mine minerals to the exclusion of other citizens of the Choctaw and Chickasaw Nations, for the reason that the Chickasaw Indians had an interest in the question and had not been consulted. The court stated that inasmuch as the Chickasaws, with the consent of the United States, had bought an interest in the Choctaw lands, the Choctaw Nation could not, without the consent of the Chickasaws, grant mineral rights to individuals. This provision of the Choctaw Constitution granting indefeasible rights in minerals was held to be invalid for two reasons:

1. It was an appropriation and *sale* of realty without the consent of the Chickasaws.

2. It was in violation of a treaty providing that the lands should be held in common "so that each and every member of either tribe shall have an equal undivided interest in the whole."

This provision of the constitution was held void, therefore, as in conflict with the treaty, and also a certain act of the Choctaw council conferring title to the discoverer of minerals. It was held that the act was void because the council had no power to convey lands. The title to the lands is vested in the people in common.

This is a very important decision, because the situation of the Chickasaws with reference to the Choctaws is the same as that of the Delawares with reference to that of the Cherokees.

In brief, the question for decision is this: Can the Cherokee Nation, after making a solemn treaty with the Delawares, giving them certain specific rights in the lands and funds of the Nation, diminish or cut down those rights by acts which in effect grant undivided interests in such funds and lands to persons who did not contribute to them? We think the answer should be in the negative.

POINT XIII.

Vast Sums of Cherokee Funds Have Been Misappropriated or Squandered or Stolen Without the Consent or Participation of the Delawares.

These funds should be charged off to the Cherokee Nation so that Delawares may participate in the Delaware funds as though such stealing had not occurred.

The court below took the position that the maladministration of funds was a political question and the court could not go into it, but the Delawares, as members of the Nation, were bound by its acts.

We think the court should consider fully the fact that Congress intended to have fixed once for all just what property the Delawares were entitled to. This question necessarily involves a mathematical proposition. How many

Delawares are there? How many Cherokees? What are the funds and lands involved, and shall the Delawares suffer because the Cherokee council, against their protests, dissipated the funds to which the Delawares had contributed?

The record is full of evidence showing the misappropriation of vast sums of money, with respect to—

A. The so-called Whitmire steal;

B. Various frauds in the auditor's office, and

C. Other wasteful and unlawful or fraudulent disposition of the common funds.

If this court shall agree with the court below that the question is merely a political one, it will not be necessary to consider the evidence. If this court, however, shall hold that the Delawares must not suffer because of these misappropriations, then an accounting will be necessary to determine the precise amount of these stealings.

We will not, therefore, burden the court with the details of the evidence until the court decides the questions of law involved.

POINT XIV.

From the Discussion Which Has Been Had in the Preceding Portions of This Brief We Respectfully Submit That We Have Beyond Peradventure Established the Following Facts:

1. That prior to April 8, 1867, the Delaware Indians were living in the State of Kansas, on lands owned by them in severalty, by absolute title, being allotments of approximately 80 acres apiece, with the right of inheritance by their heirs in case of the death of any of the several owners of the land.

2. That prior to said time and at the instance of the United States Government, which desired them to remove to the Indian country south of Kansas, delegations were sent out by the Delawares to seek a new location for the Indians,

having in contemplation the sale of their homes in Kansas and the purchase of new homes in the Indian Territory, which at that time embraced all of the territory now within Oklahoma, except the tract of country formerly known as "No Man's Land," lying north of the Panhandle of Texas. These delegations examined several tracts of land ceded by the various treaties of 1866 to the United States by the Choctaws, Chickasaws, Creeks, and Seminoles and also lands in the Cherokee Nation, both west and east of the 96 meridian, and selected a tract of land east of that meridian, within the Cherokee home reservation.

3. That the Delawares never had in contemplation any intention of making other arrangements so far as related to the purchase of new homes than the purchase of the land for these homes outright, to be owned by them free of any right of property in any other nation of Indians, the preference of the Delawares being to have the land they purchased for the new homes in a compact body, one tract with definite boundaries, separate from the lands of any other Indian tribe, to be allotted to the individuals as their Kansas lands had been allotted.

4. That in the negotiations with the Cherokees it was found impracticable (on account of the unwillingness of the Cherokee Nation) to cut off from their reservation and grant a tract of land within their home tract, or to cede their jurisdiction over the same, as a tract could not be found in the Nation sufficiently large that did not embrace settlements by Cherokees.

5. That the Delawares were unwilling to go into the Cherokee Nation unless they could purchase outright the land for the new homes contemplated in their treaty of 1866, to be theirs independent of any right of property in the Cherokee Nation or individual Cherokees, and the parties, therefore, did the next best thing to what the Delawares desired, and that was to arrange for the sale by the Cherokee Nation and the purchase by the Delawares of 160

acres of land for each registered Delaware, to be selected by the Delawares anywhere in the Cherokee Nation not interfering with the selections that had already been made by the citizens of the Nation. The jurisdiction of the Cherokee Nation over these lands for governmental purposes was preserved and the Delawares were restricted from alienating or disposing of said lands except in accordance with the constitution and laws of said Nation.

6. That it was understood by the Delaware and Cherokee representatives, who negotiated this agreement, that the Cherokees would have no right of property in the lands purchased by the Delawares for $1 per acre, but should have the right of government over said lands as being within their public boundaries.

7. That the Delaware and Cherokee representatives also understood that, by said agreement, the Delawares should have, in addition to said lands purchased by them in absolute property, also all the rights, privileges, and immunities of native Cherokees in the common property of that Nation, other than the lands purchased by the Delawares as aforesaid, in consideration of the further payment of $121,824.28 by said Delawares, as their proportion in the ratio of 1 to 13.78 in the funds of said Nation.

8. That it was intended by the parties to the Delaware-Cherokee agreement, by the language used, and said agreement provided that the Cherokee Nation thereby sold and granted to the Delawares 160 acres of land for each and every Delaware whose name should appear on a certain register described therein, at a consideration of $1 per acre, to be paid by the Delawares to the Cherokee Nation; in all, 157,600 acres.

9. That in addition to the land so sold as above described each and every Delaware who moved into the Cherokee Nation under said agreement and settled there also became entitled to all the rights and immunities of native Cherokees in and to the common property of said Nation, including the

land of said Nation other than that sold to the Delawares as aforesaid, and the funds of the Nation held in trust by the United States, upon the compliance by the Delawares with the condition of payment into the funds of the Nation, of a proportionate share of said funds in the ratio of 1 Delaware to 13.78 Cherokees, as provided therein.

10. That there were on the register of Delawares referred to in the agreement 985 names, representing Delawares who had indicated their desire and willingness to move to the Cherokee Nation, and the aggregate quantity of land purchased by the Delawares from the Cherokee Nation, to be paid for at $1 an acre, was 157,600 acres.

11. That the Delawares fully complied with all of the provisions of the said agreement of April 8, 1867, by the payment on May 21, 1869, of the sums of $157,600, being the amount due for the lands purchased by the Delawares from the Cherokee Nation, and $121,824.28, being the amount due under the agreement for the rights of citizenship acquired by the Delawares who removed to the Cherokee Nation.

12. That the Delawares have selected and improved and are now occupying 157,600 acres of land in the Cherokee Nation, being the lands described in the testimony of Horace M. Adams (Rec. p. 339 et seq.), as shown on Complainant's Exhibit BB to FFFFF, both inclusive.

13. That the Delaware Indians have continued to maintain a separate tribal organization in the Cherokee Nation for the purpose of managing and administering their separate tribal property, in which the Cherokee Nation had no interest and over which the said Nation had no control. That said tribal organization until 1895 was the continuation of their ancient tribal government of chief and councilors; and that since 1895 said separate tribal organization has been administered by a business council or committee of five men elected by the people.

14. That the Cherokees have by the illegal admission of

persons not entitled to citizenship in the Cherokee Nation, without consideration therefor, attempted to decrease the per capita interests of the citizens of the Nation to the damage of the complainants, for which said Cherokees should account.

15. That the communal funds of the Cherokee Nation have been wastefully, improvidently and negligently disbursed to persons not entitled to participate therein, and Cherokees of high official position in the Nation have wrongfully and fraudulently received large amounts of money from the Cherokee Nation's common funds without consideration or services whatsoever to the Cherokees therefor, to the damage and hurt of the complainants, for which sums the Cherokees should account.

These fifteen propositions we think we have established without any question, and incidentally to them there are other important propositions of fact or of law which we think are likewise established beyond peradventure.

16. A proper construction of the Delaware and Cherokee treaties of 1866 and the agreement of 1867, without resorting to any parol evidence, shows that the contentions we have made are well-founded with respect to the interest of the Delawares, not only in the 157,600 acres of land, but in the other lands and funds of the Cherokee Nation.

17. The Government of the United States and the Cherokees themselves, as shown by their records and official acts, have recognized the title of the Delawares, as we claim it.

18. The United States, by its treaties with the Delaware Indians, have guaranteed that the Delawares shall be protected in their property rights, and it appears that the Delawares have always owned their lands and that they have always been loyal friends of the Government, and have carried out their treaty obligations.

19. The parol evidence which we have given to explain the understanding of the parties is competent, relevant, and admissible.

20. The complainants are properly in court and have capacity to sue according to the provisions of the Curtis act, section 25.

21. With respect to the outside lands and funds of the Cherokee Nation, the Delawares are entitled to share in the original ratio of 1 to 13.78.

22. If the court does not agree with us on this last proposition, then the Delawares are entitled to share pro rata with all the Cherokees, who are under the constitution and laws of the Cherokee Nation properly citizens of such Nation, with respect to such outside lands and funds.

23. This court has jurisdiction to determine who are lawful citizens of the Cherokee Nation, and for that purpose should order a census to be taken to determine the numbers of such citizens. This has been done in other cases.

24. This court has further jurisdiction as incidental to its general powers to take an accounting with respect to the misappropriation and unlawful disposition of the national funds of the Cherokee Nation.

25. This court should determine also that the Delawares are entitled to share in a proper proportion in any further moneys which in the future may be recovered or paid over to the Cherokee Nation.

26. This court should decree, as prayed for in the petition, that a proper deed of conveyance be executed by the Cherokee Nation to vest the Delaware Indians with full title to the said 157,600 acres of land, which property then the Delaware council can properly allot, according to its rights and the rights of the individual Delawares.

27. Upon the death of a registered Delaware, the lands occupied in severalty by him, comprising a part of the 157,600 acres, did not revert to the Cherokee Nation, but passed by descent to his heirs in or for occupancy and became a part of the common holding of the *Delawares*. In no event did such lands revert in any way so as to become a part of the Cherokee national lands.

28. The Cherokee national lands, outside of the 157,600 acres, are held by all the lawful Cherokee citizens, including the Delawares, as tenants in common, in the same way as the lands of the Choctaws and Chickasaws are held, as appears from the decision in the case of Ainsley *vs.* Ainsworth, which we have heretofore considered.

29. The Delawares have not by any participation in the government of the Cherokee Nation estopped themselves from objecting to the illegal admission of citizens and the improper waste of funds.

The facts in this case are such that the court should exercise every power which may be necessary to accomplish a full and just determination of this controversy between the parties, so as to avoid further litigation.

POINT XV.

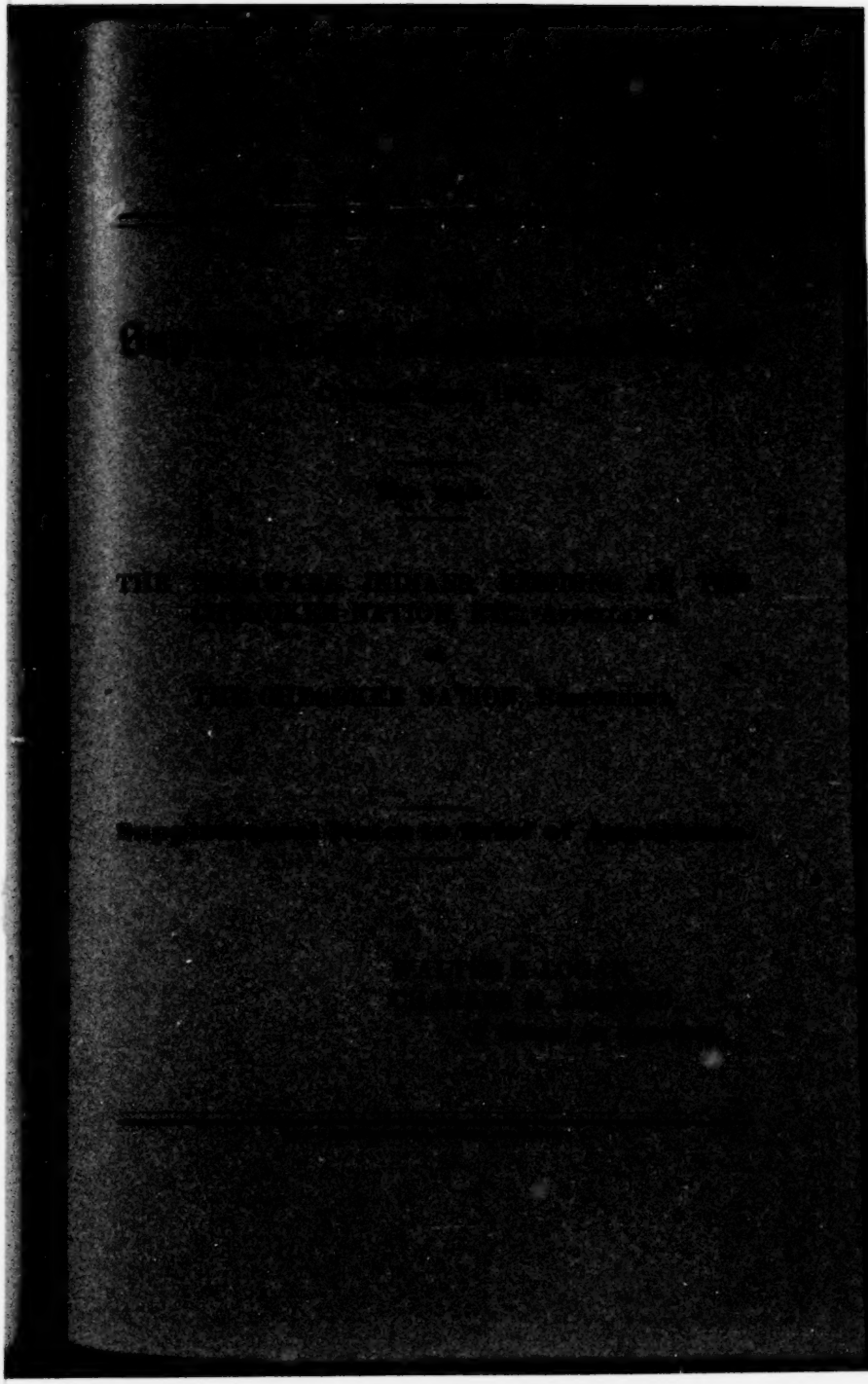
The Decree of the Court Below Should be Reversed and This Court Could by Its Own Decree Render Judgment in Accordance with the Claim of the Delawares as Set Forth in the Preceding Point, and Should, if Necessary, Order a Census to be Taken and an Accounting to be Had, in Order That the Question of the Reciprocal Rights of the Delawares and Cherokees May Forever be Set at Rest.

Respectfully submitted,

WALTER S. LOGAN,

CHARLES M. DEMOND,

Of Counsel for Appellants.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 240.

THE DELAWARE INDIANS, RESIDING IN THE CHEROKEE NATION, ETC., APPELLANTS,

vs.

THE CHEROKEE NATION, RESPONDENT.

Supplemental Notes to Brief of Appellants.

1. The respondents in their brief, at page 7, section 5, referring to the ~~treaties~~ agreement between the Delawares and the Cherokees (which they improperly designate as a treaty), declare that the *habendum* clause in said contract provides for continual ownership and occupancy of the land, "but expressly limits this to the registered Delawares, and omits entirely all reference to their heirs and assigns, which are words absolutely necessary, at common law, to a title in fee simple."

The answer to this is evident. The parties to the Cherokee agreement were negotiating a contract, which in its effect embraced other matters than the fixing of the status of the lands which were purchased under it. As stated in the brief of the appellants, heretofore filed herein, this contract was not a patent, or even a deed in form, but was an agreement which, among other things, included a bargain and sale of certain lands, and it was not the intention of the parties,

and was not by them deemed necessary, that it should be in the form of a deed. Indeed, in none of the treaties or agreements between the United States and the various tribes or bands of Indians, with which dealings have been had respecting their lands, with perhaps a solitary exception, in the case of the Cherokee patent of 1838 (which contains no limitation to heirs or assigns), has any instrument passed between the contracting parties having the formal parts of a deed, and this effort to put a construction upon the contract in question different from that which was the manifest intention of the parties, on account of the lack of formal words such as are deemed necessary to a deed at common law, is only an effort to obscure the main facts by a discussion of technicalities, which have not in this case, and never have had in any similar case, any force whatever.

The assertion of counsel for respondent, that the Delawares have "not sustained a tribal government since their removal," is dehors the record, and is not true in fact, while the assertion that "no man can serve two masters, neither can a Delaware be a member of two nations," when applied to the conditions surrounding the Delawares in the Cherokee Nation, is the most idle sophistry.

Why could not the Delawares maintain a separate tribal organization within the Cherokee Nation? Was not this a condition contemplated and provided for by the Cherokee treaty of 1866? Does not the Cherokee Nation maintain a tribal organization within the United States? Do not all the States maintain complete political organizations within the United States? Do not counties and cities maintain political organizations within the several States far more complex, formal, permanent, and independent than Indian tribal organization? Would there be anything extraordinary about the Delawares maintaining a tribal organization within the Cherokee Nation, not inconsistent or incompatible with their obligations to the Cherokee Nation under

their contract? Do not the Choctaws and Chickasaws exist as one community as to their lands and certain relations with the United States, and at the same time maintain separate tribal organizations?

Such a contention is too idle to merit serious discussion, and, as a matter of fact, the assertion of respondent's counsel is not true, for the Delawares *have* maintained, from the time of their settlement in the Cherokee Nation, a complete organization; have held separate elections; have had a chief and other tribal officers, and have had numerous councils, whose transactions have been recognized by the United States, and whose acts have been the basis of financial adjustment with the United States involving immense sums of money. The case of Journeycake against the United States, to which respondent's counsel have made frequent references in the argument, was brought in the Court of Claims, under authority of Congress, by Charles Journeycake, *principal chief of the Delaware Indians.* Charles Journeycake was elected chief of the Delaware Indians at an election held by the Delawares after their arrival in the Cherokee Nation, and remained such chief till the time of his death, in 1894. The funds of the Cherokee Nation remaining invested with the Government after the purchase of their lands in the Cherokee Nation, amounting to nearly $1,000,000, were paid by the United States to the Delawares in 1891–1893, pursuant to resolutions passed at certain councils held by the Delaware Indians, whose proceedings were adopted and approved by the Department of the Interior. The act of Congress, under which the case at bar was brought, in the Court of Claims, provides in section 25 thereof "that before any allotment shall be made of lands in the Cherokee Nation, there shall be segregated therefrom, by the commission heretofore mentioned, in separate allotments or otherwise, the 157,600 acres purchased by the *Delaware tribe of Indians,*" etc.

After the death of Charles Journeycake, in 1895, the

Delaware Indians were requested by the Department of the Interior, instead of electing another principal chief, to elect a business committee, who should be the governing body of said tribe for all purposes, and in response to such request said business committee was elected, and is one of the complainants in the suit at bar. Councils have been repeatedly held, even up to within the last few months, by the Delaware Indians, *as a tribe or band*, and their action has received the formal approval of the Department of the Interior.

If any of this statement is outside the record, it is no more so than the assertion in respondent's brief, to which it is a reply and by which it is made necessary.

The contention that the Delaware treaty of July 4, 1866, and the Cherokee treaty of July 19, 1866, are not to be considered in this case, in construing the Delaware contract of 1867, is so manifestly erroneous that it seems hardly worth discussing. Under what authority could these two tribes have entered into a contract affecting their lands and funds held by the Government, save that of these two treaties? What right had the Cherokees to sell except that conferred in the treaty of 1866, and what right had the Delawares to buy except under their treaty of July 4, 1866? What right had the Treasury Department of the United States to transfer the trust funds of the Delawares to the trust funds of the Cherokees save the authority contained in these two treaties?

It has been repeatedly held by the courts, and has been the unbroken practice of the Government throughout all of its dealings with the Indians, that the funds of an Indian tribe can not be paid even to the Indians for whose benefit the fund is held, except pursuant to the specific direction of Congress, either in an enactment for that purpose or by the ratification of some treaty containing provision for such disbursement. How then could the trust funds of the Delawares be paid over to the Cherokee Nation except for the

authority contained in the treaty of July 4, 1866, providing for a purchase by the Delawares, and the treaty of July 19, 1866, providing for a sale by the Cherokees?

It is also the unbroken and undisputed current of all the authorities that in the construction of a statute or a contract all the surrounding circumstances and history leading up to the execution of the instrument itself are to be taken into consideration in determining the intention of the parties.

Hahn *vs.* United States, 107 U. S. 402.
U. S. *vs.* Recorder, 1 Blatch. 218.
Polk *vs.* Hill, 2 Overton, 118.
Smith *vs.* Townsend, 148 U. S. 490.

The treaty of July 4th, 1866, with the Delaware Indians created two classes of persons, first, those who retained their tribal autonomy and removed to the Indian territory, and second, those who ceased to be Delaware Indians, in the tribal sense, who filed their declarations of intention to become citizens of the United States (and who afterwards did so), who received patents to their lands in Kansas, and to whom was distributed their share of the tribal fund, amounting to between twelve and thirteen hundred dollars each. If it can be contended that the class out of whose common fund the tract of land in the Cherokee Nation was purchased was no longer a tribe, and consequently incapable of holding communal property, and that the land purchased was not purchased in common or for communal use, then there is no escape from the proposition that the balance of the common fund not used for the purchase of land was not a common fund, but also belonged to the individual registered Delawares, share and share alike. This is clearly *not* the construction placed upon it by the Government, for in 1891–1893 the balance of that fund, amounting to nearly a million dollars, was paid out by the Government, *not* to the original registered Delawares, but to the whole

Delaware tribe, *per capita*, being the registered Delawares, and their descendants, after being held in the treasury for twenty-five years as the communal fund of the Delaware tribe. So if the contention of the respondent is true, that the land purchased out of this tribal fund did not become tribal land, then this fund was paid to these people by the United States improperly.

Not only does the decree in the court below wholly fail to carry out the purpose of the jurisdictional act, but the finding of the court, upon which the decree is based, creates a condition which certainly never could have been contemplated, and can not be tolerated, and which is impossible of adjustment.

There are still living about 212 original registered Delawares. These are the ones who, at the time of the purchase of the tract of land in question, were infants or very young persons; about all of those who were of mature years having since died. Most of these 212 persons still have a long expectancy of life. The Cherokee Nation, as a political organization, will be dissolved during the next two years; a territory and then a state will be organized out of the territory now composing the Indian Territory. To whom, then, will these 212 quarter sections of land revert, when the life estates of the registered Delawares, now entitled to possession, shall die? There is nothing in either the treaty between the Delawares and the United States, or the Cherokees and the United States, or in the Delaware-Cherokee agreement, or in any law of the United States, which makes any provision as to what shall become of the lands of the registered Delawares at the expiration of any life estate. The reason for this is not far to seek, for this claim that by the contract of 1867 the Delawares took a life estate only, is an afterthought, and was not in anybody's mind when that contract was entered into, nor has it been in anybody's mind when any of the subsequent legislation has been enacted; for from the day when that contract was under

negotiation down to the beginning of this suit the uninterrupted current of all the declarations of the officers of the United States, of the Executive Departments, which have had occasion to refer to the subject at all, and of the Cherokee Nation and its officers, show, beyond the possibility of a question, that it was the understanding of all that the Delaware Indians, by the agreement of 1867, bought absolutely all the right, title, and interest of every nature or kind, in and to the 157,600 acres which the Cherokee Nation at that time possessed, and subject only to the possible reversion to the United States, which was expressed in the patent delivered to the Cherokee Nation in 1838.

As shown by the respondent's counsel in their brief, the Delaware-Cherokee agreement of 1867 consists of two parts, the first of which provides for the purchase of 157,600 acres of land at one dollar per acre, and follows strictly the direction contained in the Cherokee treaty of 1866; the second part for the payment into the treasury of the Cherokee Nation of a sum of money, bearing the same relation to the national fund of the Cherokee Nation that the number of Delawares, about to be incorporated, bore to the whole number of Cherokee citizens. This second payment amounted to $121,824.28, and was commonly called the "equalization fund," from the fact that it was paid into the national treasury in that particular amount, in order that the per capita fund of the Cherokee Nation should not be disturbed by the incorporation of the Delawares among them.

There is and can be nothing in the contention that because the language of the Delaware-Cherokee contract of 1867 provided that the Cherokees should sell to the Delawares a quantity of land "in the aggregate equal to 160 acres for each individual of the Delaware tribe," etc., that the contract of sale was 160 acres each to the individual Delawares thereafter to be enumerated upon a [illegible] in list. Language of this kind will be found in numerous treaties

and agreements between the United States and various bands or tribes of Indians, and it has been uniformly held by this court and by the departments that sales of this character were *en bloc*, and that the expression of so much land to each person was simply the unit of measure by which the amount of land to be conveyed should be determined.

It will be noticed that in the 16th article of the Cherokee treaty of 1866 it is provided that "the United States may settle friendly Indians in any part of the Cherokee country west of 96th degree, to be taken in a compact form, in quantity not exceeding 160 acres for each member of said tribe," etc. It was under this provision that the Osages, Pawnees, Kaws, Ottoes, and other bands were settled in the Indian Territory and took their reservations in bulk, the unit of measure thus provided simply being used for the purpose of determining the quantity of land that should be included within the respective purchases.

By article 19 of the Choctaw treaty of 1830 it was provided that—

> "children of the Choctaw Nation residing in the Nation, who have neither father nor mother, a list of which with satisfactory proof of parentage and orphanage being filed with the agent in six months, to be forwarded to the War Department, shall be entitled to a quarter section of land, to be located under the direction of the President, and with his consent the same may be sold and the proceeds applied to some beneficial purpose for the benefit of said orphans."

In Bates *vs.* Aven, 60 Miss. 955, the court held that—

> "when the lands were selected, as contemplated by the treaty, the title to the whole vested in the United States for the benefit of the orphans *as a class*, and no particular orphan acquired title to any particular tract thereof," etc.

This question seems to be so completely settled by the decision of this court in the United States *vs.* The New

York Indians (173 U. S. 471), that any further discussion is quite out of place. In that case the court says:

> "The second article of the treaty indicates that the grant was made upon the basis of 320 acres for each inhabitant, the recital being '320 acres for *each soul* of said Indians, as their numbers are at present computed,' but the grant was not of 320 acres for each soul, but of a tract of land *en bloc*."

How perfectly similar is this language to the language of the Delaware-Cherokee agreement of 1867. In the New York Indian case the language was "320 acres for each soul of said Indians." In the case at bar the language is, "a quantity of land . . . in the aggregate equal to 160 acres for each individual of the Delaware tribe," the only difference being that the intent to sell a tract of land in a body is more clearly expressed in the Delaware agreement than in the case of the New York Indians, for in the former case the expression is "a quantity of land *in the aggregate equal to 160 acres*," thereby showing that it did not intend 160 acres to each individual, but a quantity of land equal to it.

Indeed, it may be said that this method of determining the quantity and extent of grants to Indian tribes and bands has been quite the rule in all of our transactions with the Indians, and that the uniform and uninterrupted construction by the departments of the Government, as well as by the courts, in cases where the questions have come before the courts, has been that such grants are grants to the tribe *en bloc* and not to the individual members thereof.

If the construction of the agreement in question, which is contended for by the respondent, should prevail, it would reduce the first part of this agreement to an absurdity, and would rob the Delawares of all motive for entering into it, and of all consideration under it; for it has been shown, in the principal brief for appellants, and is not susceptible of contradiction, that as long as the lands of the Cherokee

Nation continue to be held in common the payment of this equalization fund secured to the Delawares the right to select, occupy, and use any land in the Cherokee Nation not already in the occupancy of a Cherokee, without limit as to time, place, or amount, and under the Cherokee law he could not be disturbed in such possession and was the absolute owner of all improvements that he might make. That for the payment of this equalizing fund he acquired all of the property rights of a native Cherokee was decided by this court in the case of the Cherokee Nation against Blackfeather (155 U. S. 218), commonly known as the Shawnee case, the Shawnees having paid in an equalizing fund only, and not having purchased any specific lands, and under this payment, by the decision referred to, they are now being allowed the same amount of land as native Cherokees. So the Delawares had nothing to gain by the purchase of 157,600 acres so long as the land remained in common, if the contention of respondents is correct that by such purchase they acquired a life estate only. Then, under this contention, what did they get for the payment of $157,600, which was largely in excess of the amount paid for equal rights or equalizing purposes? Simply, as counsel for respondents assert, a privilege, running to those surviving at the time the lands should be divided in severalty, to occupy 160 acres of land, during their lifetime, instead of receiving an allotment of 110 acres, to them and their heirs forever, as acquired by the Shawnees under the payment of the equalizing fund only! (Act of July 1, 1902.—Public 241.) Thus creating, by the payment of this large additional amount of money, a condition far worse than would have been the situation had this amount never been paid!

That 985 Delawares should each pay $160, being more than the whole title to the land was worth at the time, in order that the survivors of them should enjoy this small privilege, is a proposition so monstrously absurd upon its face, and so inconceivable for any sane man to entertain, that its

mere statement is its sufficient refutation. The excuse for it, set out on page 21 of respondents' brief, that the "Delawares had the right of personal individual selection to choose the best lands out of the millions of acres" is no answer at all, for, as just shown, they had this same identical right of selection, under the second part of their contract, without any reference to the payment of $1 per acre, and the payment of this $1 an acre does not enlarge their privilege in the estimation of a hair.

There is no escaping the conclusion that if the contention of the respondent could prevail, it would result that all the benefits, privileges, and rights of the Delawares were purchased for the hundred and twenty-two thousand and odd dollars—the equalization fund—and that for the larger sum of $157,600 they acquired worse than *nothing*.

To support the contention of the respondents makes the whole first part of the contract of 1867 an absurdity, and puts the Delawares, who entered into it, in the light of wanting even the first rudiments of business sense, and involves the adjustment of the affairs of the Delaware people and the Cherokee Nation in inextricable difficulty, while the contention of the appellants gives meaning and vitality to the contract of 1867, and to every part of it, and renders the adjustment of the rights of the parties to this suit, in respect to the lands in the Cherokee Nation, simple, easy, and natural, and free from any complications whatever.

Respectfully submitted.

WALTER S. LOGAN,
CHARLES M. DEMOND,
Of Counsel for Appellants.

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Office Supreme Court
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JAMES H. McKENNEY,
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1903.

THE DELAWARE INDIANS, ETC., *Appellants.*
vs.
THE CHEROKEE NATION, *Appellees.*
No. 240

Exhibits to brief of appellants as requested by the court, being extracts from reports of the Commissioner of Indian Affairs, and

1. **Delaware Treaty of 1860.**
2. **Delaware Treaty of 1866.**
3. **Cherokee Treaty of 1866.**

NOTES IN RESPONSE TO QUESTIONS BY THE COURT.

NOTE 1. The proposition has been stated to the court by counsel for respondent, that in order for the court to hold that the Delaware Indians were incorporated with the Cherokees under the second clause of Article 15 of the Cherokee Treaty of July 19, 1866, it would have been necessary that the price agreed upon, and paid by the Delawares for their lands, should have been included in estimating the National Fund of the Cherokees, under said agreement, and the statement is made that the $157,600 paid by the Delawares to the Cherokees was not included in estimating the National Fund of the Cherokees.

Both parts of this proposition are incorrect. The contention of counsel is based upon the following language in Article 15 of the Cherokee Treaty, being the second paragraph thereof:

> "And the said tribe thus settled shall also pay into the National Fund, a sum of money, to be agreed upon by the respective parties, not greater in proportion to the whole existing National Fund, *and the probable proceeds of the land herein ceded or authorized to be ceded or sold, etc.*"

Nothing can be clearer than that this language refers to the land ceded and authorized to be sold by Article 17 of the treaty, to wit, what was known as the neutral lands in Kansas, and at the time estimated at about 1,000,000 acres, and nothing can be clearer than that the language quoted did not refer to the payment for the purchase of land by the incoming Indians to the Cherokee Nation.

Secondly, nothwithstanding the fact that the treaty of 1866 did not require that the money to be paid into the Cherokee Nation should be included in estimating the National Fund, nevertheless it would have been impossible

for the parties to the agreement of 1867 to have arrived at the conclusion they did, that the National Fund of the Cherokee Nation was $678,000, unless they had, as a matter of fact, included the payment made by the Delawares; for the court will see by reference to the report of the Commissioner of Indian affairs for 1867, page 352, that in 1867 the funds of the Cherokee Nation amounted to $620,500.

By reference to the report of the Commissioner of Indian Affairs for 1869, it will be seen that the national warrants of the Cherokee Nation, outstanding at the time the Delaware Cherokee agreement was entered into, and which by its terms were to be deducted, amounted to $120,422. Now deducting this liability from the National Fund would leave $500,078, being $178,000 less than the amount estimated in the Delaware-Cherokee agreement.

It may be answered that the addition of the $157,600 paid in by the Delawares would not be sufficient to make up this difference, but it must be remembered that there were 1,280 Delawares then residing in Kansas and eligible to be included upon the register of those electing to remove to the Cherokee Nation, and at that time neither the Cherokees nor the Delawares knew or could know the exact number who would elect to so remove, and that number necessarily had to be estimated. It will be seen that if the estimate was placed at 1,118 it would account for this difference in funds. As the roll at the time the agreement was entered into consisted of about 900 names, and there were thirty more days for its completion, they would naturally estimate considerable additions thereto.

The estimate would then stand thus:

Funds of the Cherokee Nation in 1867 . . .	$620,500
Estimated to receive from Delawares for land .	178,000
	$798,500
Outstanding indebtedness of the Cherokee Nation, March 7, 1867 . . .	$120,420
	$678,080

NOTE 2. Under the last clause of Article 19, a large number of Cherokees residing upon the neutral lands in Kansas, elected to remain there and become citizens of the United States. All these received patents to 320 acres each. This greatly reduced the neutral lands to be sold, which were estimated in said agreement at 1,000,000 acres, but which in fact were only 799,614.72 acres (See Report of the Commissioner of Indian Affairs for 1868, page 331), and also greatly reduced the amount of money received therefrom, which was estimated at $1,000,000, but which proved to be, when the land was sold, on long credit, only $799,614.72. As a matter of fact, even from this amount a large sum was deducted as expenses of sale. As a result the Delawares paid a much larger rate for citizenship than they should have done.

Later, all the Cherokees who had so remained in Kansas and received land, were re-admitted into the Cherokee Nation, free of cost, and are now being allotted lands again to the same extent as those who did not receive lands in Kansas.

NOTE 3. During the course of the argument, counsel for appellants was asked by the court if the amount paid by the Delawares for equal rights was based upon the per capita value of the invested funds of the Cherokee Nation only, then what consideration was there moving to the Cherokee Nation for the right of participation in the lands of the Cherokees other than those purchased under the first part of the agreement.

The answer to this may not be found in the record. By the decision of this court, in the cases of the Cherokee Nation v. Journeycake (155 U. S., p. 179) and the Cherokee Nation v. Blackfeather (155 U. S., p. 218), it was decided by this court that the payment of this equalizing fund, for equal rights, did, as a matter of fact, carry with it an interest in the lands and property of the Cherokee Nation equal to that of native Cherokees.

As to the query, what consideration passed to the Cherokees for this, counsel can only state his own views, which are based upon the understanding which seems to have been general, that it was necessary to offer some inducement to the Delawares to remove from their homes in Kansas and take up residence in the Indian Territory. An Indian's aversion to leaving his home and the surroundings of a life time is well known and has been the cause of no little embarrassment to the government in the negotiation of many of the treaties with these people. They cling, with even greater tenacity than white people, to the scenes and associations of their early life. At this time all of the five civilized tribes were in an impoverished and destitute condition. They had been torn and decimated by the war, having been divided in sentiment, a part having joined the armies of the North and a part have affiliated with the South. Their improvements had been destroyed, their herds scattered, and when they return, after the close of the war, with feelings of extreme bitterness existing between the two factions, they found their country an absolute waste. In addition to this, there were two years of almost total failure of crops. They needed money and had applied to the Federal government for assistance, but instead of granting this directly, arrangements were made for them to make sales to other friendly Indians and in that manner obtain relief which the government was not able or willing to extend directly. This would accomplish a triple purpose—it would relieve the government from the necessity of making a direct appropriation; it would provide an outlet for the bands in Kansas that it was the purpose and determination of the government to remove, and it would supply occupants for the lands of the five civilized tribes in the Indian Territory, which were understood to be largely in excess of their needs.

To induce the Delawares to remove from their homes in Kansas, to which they have become attached and where their children and grandchildren had been born, it was

necessary to offer some further consideration, and this consideration was that, at some then distant time, when these lands should be divided in severalty, the Delawares should be accorded the same rights in the distribution of the public domain as native Cherokees.

Added to this was a third reason, which was political in its nature. By the Cherokee treaty of 1866, it was provided that the Cherokee Indians who had joined the Confederacy should be settled in Canadian District, south of the Arkansas River, and, if this district should be insufficient for their accommodation, in the northwestern portion of said Nation. These Southern Cherokees were greatly in the majority in numbers, and it will be noticed that the freeman, who by the same treaty were incorporated in the Cherokee Nation, were settled in these same districts, the purpose being, as is well known, to counterbalance the sentiment that otherwise would exist in those two districts. The settlement of the Delawares or other Kansas Indians in the Cherokee Nation would also have a tendency to overcome the political majority of those who had affiliated with the Southern Confederacy.

EXTRACTS FROM THE REPORTS OF THE COMMISSIONER OF INDIAN AFFAIRS.

Report of the Commissioner for 1867.

INDIAN TRUST FUNDS.

No. 2—*Statement of stock account, exhibiting in detail the securities on which the funds of each tribe are invested and now on hand, the annual interest on the same, and the amount of abstracted bonds not provided for by Congress.*

Stock.	Per centum.	Original amount.	Amount abstracted and not provided for by Congress.	Amount on hand.	Annual interest.
CHEROKEE NATIONAL FUND.					
Florida	7	$7,000 00		$7,000 00	$490 00
Georgia	6	1,500 00		1,500 00	90 00
Kentucky	5	6,000 00		6,000 00	300 00
Louisiana	6	7,000 00		7,000 00	420 00
Missouri	6	50,000 00	$50,000 00		
North Carolina	6	20,000 00	13,000 00	7,000 00	420 00
South Carolina	6	117,000 00		117,000 00	7,020 00
Tennessee	6	5,000 00	5,000 00		
Tennessee	5	125,000 00		125,000 00	6,250 00
Virginia	6	90,000 00		90,000 00	5,400 00
		428,500 00	68,000 00	360,500 00	20,390 00
CHEROKEE ORPHAN FUND.					
Virginia	6			$45,000 00	$2,700 00
CHEROKEE SCHOOL FUND					
Florida	7	$7,000 00		$7,000 00	$490 00
Louisiana	6	2,000 00		2,000 00	120 00
Missouri	5½	10,000 00		10,000 00	550 00
Missouri	6	5,000 00		5,000 00	300 00
North Carolina	6	21,000 00	$8,000 00	13,000 00	780 00
South Carolina	6	1,000 00		1,000 00	60 00
Tennessee	6	7,000 00	7,000 00		
Virginia	6	135,000 00		135,000 00	8,100 00
United States loan of 1862	6	10,800 00		10,800 00	648 00
United States loan of 10-40s	5	31,200 00		31,200 00	1,560 00
		230,000 00	15,000 00	215,000 00	12,608 00

Report of the Commissioner for 1868.

Cherokee Neutral Lands.

Under the provisions of the 17th article of a treaty and the amendments thereto made between the United States and the Cherokee Nation of Indians, proclaimed August 11, 1866, a contract was entered into by Secretary Harlan with the American Emigrant Company, stipulating for the sale to the said company of Cherokee neutral lands in the State of Kansas containing 800,000 acres, more or less, partially on long credit, at $1 per acre, subject to the limitations and restrictions of the 17th article of said treaty as amended. As stipulated in said contract a first payment of $25,000 was made by said company August 30, 1866, date of execution of said contract.

Secretary Browning regarding the above contract of sale as not being in conformity with said treaty and amendments thereto, and the Attorney General, to whom the question was submitted, sustaining the views of Secretary Browning, a supplementary article to the treaty of July 19, 1866, was concluded on the 27th of April, 1868, between the United States and the Cherokee Nation, and ratified June 10, 1868. Under the provisions of the supplemental article, the American Emigrant Company assigned, for a consideration, all its right and title in said lands to James F. Joy, the said Joy assuming all the obligations of said company under their contract modified as provided in the supplemental article of the 29th of April.

The total number of acres contained in the whole area of the Cherokee neutral lands is		799,614 72
Amount occupied by $50-improvement settlers, 17th article treaty	7,291 03	
Occupied by pre-emption claimants, 17th Article treaty	146,052 07	
Occupied by Indian settlers, 19th article treaty	6,071 93	
Area of unoccupied lands sold to Mr. Joy under his contract	640,199 69	
		799,614 72
Number of acres reported for patent to James F. Joy, October 13, 1868		108,169 70

For further information in relation to the Cherokee neutral lands, I submit a general synopsis of the areas and valuations of the land taken from the report of the commissioners appointed to make the appraisement. As regards the correctness of this synopsis it may be well to state that owing to the voluminous character of the appraisers' report, and its having been so recently transmitted to this office, sufficient time has not elapsed to make a thorough examination of the same. I also submit a consolidated statement presenting in a more concise manner the trust land accounts than is reported as above in detail, which I trust will be found satisfactory.

Very respectfully, your obedient servant,

LONSVILLE TWITCHELL,
Clerk in charge of Indian Trust Funds.

Hon. N. G. TAYLOR,
Commissioner Indian Affairs.

Report of the Commissioner for 1869.

Payment of Cherokee National Warrants Under 23d Article, Treaty of July 19, 1866.

The payment of these warrants representing the outstanding indebtedness of the Cherokee Nation, caused by the suspension of the payment of their annuities, was commenced March 7, 1867, and continued at the request and approval of the Cherokee national council, or by delegates duly authorized by it.

The amount of said warrants paid by late Secretary Browning, subsequent to March 7, 1867, was	$94,885 66
Amount paid by Hon. J. D. Cox, Secretary, trustee, etc.	25,537 21
Total amount expended in payment of warrants	120,422 87

The sources from which the funds were derived for the payment of these warrants, are as follows:

From the proceeds of the sale of bonds held in trust for their benefit	$108,566 51
From the head of appropriation "Fulfilling treaty with Cherokees proceeds of lands"	11,856 36
	120,422 87

Sale of Cherokee Lands to Delawares

The 15th article of a treaty between the United States and the Cherokee Nation, ratified August 11, 1866, provided certain conditions or terms, upon which friendly Indians might be settled upon unoccupied lands in the Cherokee country east of the line of 96° of west longitude, the price to be agreed upon between said tribes, subject to the approval of the President of the United States.

And a treaty having been made with the Delaware tribe, ratified August 10, 1866, providing for their removal to certain lands to be ceded to the United States by the Cherokees, which was not ceded to the United States, an agreement was made between the Cherokee and Delaware Indians on the 8th of April, 1867, which has since been approved by the President, by which the Cherokees sold 157,600 acres to the said Delawares at one dollar per acre, in payment for which the Delawares transferred to the Cherokees certain bonds held in trust by the Secretary of the Interior, said Delawares becoming a part of the Cherokee Nation, and by other terms of the contract transferring their pro rata shares of certain other stocks held in trust by the Secretary of the Interior, to the credit of the Cherokee Nation.

See report of changes in Indian Trust Fund of this date.

Treaty between the United States and the Delaware Tribe of Indians. Concluded May 30, 1860. *Ratified and proclaimed August* 22, 1860.

A PROCLAMATION

By the President of the United States of America.

To all and singular to whom these presents shall come, Greeting: May 30, 1860.

Preamble. Whereas a treaty was made and concluded at Sarcoxieville, on the Delaware reservation, on the thirtieth day of May, eighteen hundred and sixty, by Thomas B. Sykes, as commissioner on the part of the United States, and the chiefs and headmen of the Delaware tribe of Indians hereinafter mentioned, which treaty is in the following words, to wit:

Contracting parties. Articles of agreement and convention made and concluded at Sarcoxieville, on the Delaware reservation, this thirtieth day of May, one thousand eight hundred and sixty, by Thomas B. Sykes, as commissioner on the part of the United States, and the following named chiefs of the Delaware tribe of Indians, viz: John Connor, head chief of the whole tribe; Sar-cox-ie, chief of the Turtle band; Ne-con-he-con, chief of the Wolf band; Rock-a-to-wha, chief of the Turkey band, and assistants to the said head chief, chosen and appointed by the people, and James Connor, chosen by the said chiefs as delegate.

Provisions of treaty of May 6th, 1854. Article I. By the first article of the treaty made and concluded at the city of Washington, on the sixth day of May, one thousand eight hundred and fifty-four, between George W. Manypenny, commissioner on the part of the United States, and certain delegates of the Delaware tribe of Indians, which treaty was ratified by the Senate of the United States on the eleventh day of July, one thousand

Vol. x. p. 1048.

eight hundred and fifty-four, there was reserved, as a permanent home for the said tribe, that part of their country lying east and south of a line beginning at a point on the line between the Delawares and Half-breed Kansas, forty miles in a direct line west of the boundary between the Delawares and Wyandottes; thence north ten miles; thence in an easterly course to a point on the south bank of Big Island creek, which shall also be on the bank of the Missouri river, where the usual high-water line of said creek intersects the high water line of said river. And by the eleventh article of said treaty it was stipulated that "at any time hereafter when the Delawares desire it, and at their request and expense the President may cause the country reserved for their permanent home, to be surveyed in the same manner as the ceded country is surveyed, and may assign such portion to each person or family as shall be designated by the principal men of the tribe: Provided, such assignments shall be uniform."

The Delawares having represented to the government that it is their wish that a portion of the lands reserved for their home may be divided among them in the manner contemplated by the eleventh article of the treaty aforesaid, it is hereby agreed by the parties hereto, that the said reservation shall be surveyed as early as practicable after the ratification of these articles of agreement and convention, in the same manner that the public lands are surveyed; and to each member of the Delaware tribe there shall be assigned a tract of land containing eighty acres, to include in every case, as far as practicable, a reasonable portion of timber, to be selected according to the legal subdivisions of survey.

Reservation to be surveyed.

Eighty acres to be assigned to each member of the tribe.

Mode of division.

Article II. The division and assignment in severalty among the Delawares of the land shall be made in a compact body, under the direction of the Secretary of the Interior, and his decision of all questions arising thereupon shall be final and conclusive.

22050

Certificates shall be issued by the Commissioner of Indian Affairs, for the tracts assigned in severalty, specifying the names of the individuals to whom they have been assigned respectively, and that the said tracts are set apart for the exclusive use and benefit of the assignees and their heirs. And said tracts shall not be alienable in fee, leased, or otherwise disposed of, except to the United States or to members of the Delaware tribe, and under such rules and regulations as may be prescribed by the Secretary of the Interior; and said tracts shall be exempt from levy, taxation, sale, or forfeiture, until otherwise provided by Congress.

Certificates to issue, &c.

Land not alienable, except, &c.

Prior to the issue of the certificates aforesaid, the Secretary of the Interior shall make such rules and regulations as he may deem necessary or expedient, respecting the disposition of any of said tracts, in case of the death of the person or persons to whom they may be assigned, so that the same shall be secured to the families of such deceased persons. And should any of the Indians to whom tracts shall be assigned, abandon them, the said Secretary may take such action in relation to the proper disposition thereof, as, in his judgment, may be necessary and proper.

Certificates to be secured to family, &c.

Abandonment of land assigned.

The improvements of the Indians residing on the lands to be sold shall be valued by the United States, and the individual owners thereof shall receive the amount realized from the sale of the same, to be expended in building other improvements for them on the lands retained.

Improvements

Article III. The Delaware tribe of Indians, entertaining the belief that the value of their lands will be enhanced by having a railroad passing through their present reservation, and being of the opinion that the Leavenworth, Pawnee, and Western Railroad Company, incorporated by an act of the legislative assembly of Kansas Territory, will have the advantage of travel and general transportation over every other company proposed to be formed, which will run through their lands, have expressed a desire that the said Leavenworth, Pawnee and Western Railroad Com-

Leavenworth, Pawnee, and Western R. R. Co. to have a preference in the purchase of land remaining.

See amendment, *Post*, p. 164.

pany shall have the preference of purchasing the remainder of their lands after the tracts in severalty and those for the special objects herein namel shall have been selected and set apart, upon the payment into the United States Treasury, which payment shall be made within six months after the quantity shall have been ascertained, in gold or silver coin, of such a sum as three commissioners, to be appointed by the Secretary of the Interior, shall appraise to be the value of said land: Provided, in no event shall the value be placed below the sum of one dollar and twenty-five cents per acre, exclusive of the cost of survey of the same. [And that the United States will issue a patent in fee-simple to said company, upon the payment as aforesaid, for all their land remaining in Kansas.] It is, therefore, agreed by the United States that the wishes of the Delawares shall be granted; that they will accept of the trust reposed upon them; and that the money resulting from such disposition of the lands shall be disposed of and applied in the manner provided for by the seventh and eighth articles of the Delaware treaty of sixth May, one thousand eight hundred and fifty-four, after expending a sufficient sum to enable them to commence agricultural pursuits under favorable circumstances. It is also agreed that the said railroad company shall have the perpetual right of way over any portion of the lands allotted to the Delawares in severalty, on the payment of a just compensation therefor, in money, to the respective parties whose lands are crossed by the line of railroad.

Minium price, $1.25 per acre.

Vol. x. p. 1050.

Railroad company to have perpetual right of way.

Provision for Delawares who are absent.

Article IV. Whereas some years ago a good many of the Delawares went down among the Southern Indians, and as there are still about two hundred of them there, and as they have reason to believe they will return soon, it is hereby agreed that eighty acres each be set apart for them, to be allotted to them as they return, and certificates to be then issued to them, in the same manner as to those now within the reservation, and in every respect to be governed by the same rules and regulations as prescribed for the

government of the lands reserved by the preceding articles, that until they return the allotments set apart for belong to the nation in common.

Reservations.

Article V. There shall be reserved three hundred and twenty acres of ground where the mill, and school house, and Ketchum's store now stand; three hundred and twenty acres where the council house now is; one hundred and sixty acres where the Baptist mission now is; one hundred and sixty acres where the agency house now is; forty acres where the Methodist Episcopal Church South now is; forty acres where the Methodist Episcopal Church North now is; which several tracts, with the improvements thereupon, shall be disposed of when the objects for which they have been reserved shall have been accomplished, in such manner and for such purposes as the Secretary of the Interior shall determine to be just and equitable, for the benefit of the Delawares.

When to be disposed of.

Vol. x. p. 1051.

Article VI. By article fourteen of the treaty between the Delawares and the United States, of May six, eighteen hundred and fifty-four, ratified by the Senate July eleven, eighteen hundred and fifty-four, the United States bound herself to protect them and their rights; and that whereas, that depredations of various kinds have been committed upon them and their lands, it is hereby agreed that the United States shall pay them, within twelve months from the ratification of these articles of treaty and convention, thirty thousand dollars as indemnity for timber that has been cut off their reservation by the whites, and nine thousand five hundred dollars as indemnity for ponies and cattle that have been stolen from them by the whites since their last treaty with the United States. It is further stipulated that should the Senate of the United States refuse this article, it shall in no wise affect the validity of the other articles, or prejudice the right of the Delawares to appeal to the Congress of the United States for the indemnities hereby agreed upon.

United States to pay for certain depredations upon Indians.

Proviso.

Provisions of treaty of Sept. 24, 1829. Vol. vii. p. 327.

It is further understood that, at the treaty between the Delawares and the United States, made September twenty-four, eighteen hundred and twenty-nine, the boundary of the reservation then set apart for them included the Half-breed Kansas lands; but it afterwards proved that the United States had previously set apart these lands for the Half-breed Kaws, and by that means they have been kept out of the use and benefit of said lands; it is, therefore, hereby agreed that a fair valuation shall be made by the United States upon such lands, under the direction of the Secretary of the Interior, and that the amount of said valuation shall be paid the Delawares.

United States to pay for certain lands.

The chiefs and interpreter each to have a tract of land.

Article VII. In consideration of the long and faithful services of the chiefs of the Delaware nation, and of their interpreter, who is also a member of the nation, it is further agreed that the said chiefs and interpreter shall have allotted to each a tract of land, to be selected by themselves, and shall receive a patent in fee-simple therefor from the President of the United States, viz: John Connor, principal chief, six hundred and forty acres; Sar-cox-ie, chief of the Turtle band, three hundred and twenty acres; Rock-a-to-wha, chief of the Turkey band, three hundred and twenty acres; Ne-con-he-con, chief of the Wolf band, three hundred and twenty acres; and Henry Tiblow, interpreter, three hundred and twenty acres; the lines of each tract to conform to the legal subdivisions of survey. It is further agreed that, from the money as paid the Delaware tribe of Indians, in accordance with article number ten of this treaty, the chiefs of said tribe of Indians shall appropriate one thousand five hundred dollars as the annual salary of the councilmen of the said tribe of Indians.

John Connor, Sar-cox-ie, Rock-a-to-wha, Ne-con-he-con, Henry Tiblow.

Annual salary of councilmen.

Inconsistent stipulations invalid.

Article VIII. Any stipulation in former treaties inconsistent with those embraced in the foregoing articles shall be of no force or effect.

Expenses hereof to be borne by the Indians.

Article IX. As these articles are entered into for the sole use and benefit of the Delaware Indians, it is understood that the expenses incident to carrying them into ef-

fect shall be defrayed from the funds of said Indians, held in trust for them by the United States.

Interest to be paid April 1st and Oct. 1st.

Article X. The interest accruing to the Delawares under the former treaties, and that which may accrue under this, shall be paid on the first of April and October in each year.

Signature.

In testimony whereof, the said Thomas B. Sykes, commissioner as aforesaid, and the said delegates of the Delaware tribe of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

THOMAS B. SYKES, *Commissioner,* [SEAL.]
JOHN CONNOR, *Head Chief,* his x mark. [SEAL.]
SAR-COX-IE, or The Highest, *Assistant Chief,* his x mark. [SEAL.]
NE-CON-HE-CON, or Bounding Ahead, *Asst. Chief,* his x mark. [SEAL.]
ROCK-A-TO-WHA, or Sun rise, *Assistant Chief,* his x mark. [SEAL.]
JAMES CONNOR, or Ah-la-a-chick, his x mark. [SEAL.]

Signed in the presence of—

HENRY TIBLOW, *United States Interpreter,*
JAMES FINDLAY,
WILLIAM G. BRADSHAW,
SAMUEL PRIESTLEY,
THOMAS S. GLADDING.

Ratification June 27, 1860.

And, whereas, the said treaty having been submitted to the Senate of the United States, for its constitutional action thereon, the Senate did, on the twenty-seventh of June, one thousand eight hundred and sixty, advise and consent to the ratification of the same, by a resolution and with an amendment in the words and figures following, to wit:

"IN EXECUTIVE SESSION,
"SENATE OF THE UNITED STATES, June 27, 1860.

"*Resolved,* (two-thirds of the Senators present concurring,) That the Senate advise and consent to the ratifica-

tion of the articles of agreement and convention made and concluded at Sarcoxieville the thirtieth day of May, eighteen hundred and sixty, by Thomas B. Sykes, commissioner on the part of the United States, and certain chiefs of the Delaware tribe of Indians, with the following amendment:

Amendment to Article III, *ante*, p. 162.

Conditions upon which patents shall issue to the railroad.

At the end of article third, add: It being the intent and meaning of the Delawares, in consenting to the sale of their surplus lands to said company, that they should, in good faith, and within a reasonable time, construct a railroad through their reservation, and to carry out this intent as well as to secure so great a public convenience, it is agreed that no patent shall issue for any of these lands, nor shall the sale be binding upon the Delaware Indians or the United States, until the Secretary of the Interior shall be fully satisfied that a line of twenty-five miles of the road from Leavenworth City shall have been completed and equipped, when a patent shall issue for one-half of the ascertained quantity. The patent for the residue shall issue only when the said Secretary shall be satisfied that the road has been, in like manner, completed and equipped to the western boundary of the Delaware reservation. And if the said company shall fail or neglect to construct either the first or second sections of the road, or having constructed the first section and fail to complete the second section within a reasonable time, they shall forfeit to the United States all right to the lands not previously patented, and the certificate of purchase shall be deemed and considered cancelled. And provided further, That in case the said company shall fail to make payment for the lands or fail to construct the road, as hereinbefore stipulated, within a reasonable time, the surplus lands shall be disposed of by the Secretary of the Interior, at public auction, in quantities not exceeding one hundred and sixty acres; but, in no case for a sum less than the appraised value, the net proceeds to be applied in the same manner

In cases of failure, &c. surplus lands to be disposed of.

as hereinbefore specified: And provided further, That the said railroad company shall, finally, and in good faith, sell and dispose of all said lands within seven years after receiving the patent therefor, except what may be necessary for railroad purposes; and in default thereof so much thereof as may remain undisposed of shall revert to the Delaware nation, to be disposed of as is herein provided for other forfeited lands.

Railroad to sell lands within seven years.

"Attest: ASBURY DICKINS, *Secretary.*"

And whereas the foregoing amendment having been fully interpreted and explained to the chiefs and headmen of the Delaware tribe aforesaid, they did thereunto, on the twenty-first day of July, one thousand eight hundred and sixty, give their free and voluntary assent in the words and figures following, to wit:

Amendment assented to.

We, the undersigned chiefs, councillors, and headmen of the tribe of Delaware Indians on behalf of said tribe, now in full council assembled, having had fully explained to us the amendment made on the 27th day of June last, by the Senate of the United States, to the treaty made and concluded on the 30th of May last, at Sarcoxieville, on the Delaware reservation, by Thomas B. Sykes, commissioner on the part of the United States, and the following named chiefs of the Delaware tribe of Indians, viz: John Connor, head chief of the whole tribe; Sar-cox-ie, chief of the Turtle band; Rock-a-to-wha, chief of the Turkey band, and assistant to the said head chief, chosen and appointed by the people; and James Connor, chosen by the said chiefs as delegate, which amendment is in the following words, viz:

AMENDMENT.

At the end of article third add: It being the intent and meaning of the Delawares, in consenting to the sale of their surplus lands to said company, that they should, in good faith, and within a reasonable time, construct a rail-

road through their reservation, and to carry out this intent, as well as to secure so great a public convenience, it is agreed that no patent shall issue for any of these lands, nor shall the sale be binding upon the Delaware Indians nor the United States until the Secretary of the Interior shall be fully satisfied that a line of twenty-five miles of the road from Leavenworth City shall have been completed and equipped, when a patent shall issue for one-half of the ascertained quantity. The patent for the residue to issue only when the said Secretary shall be satisfied that the road has been in like manner completed and equipped to the western boundary of the Delaware reservation. And if the said company shall fail or neglect to construct either the first or second sections of the road, or having constructed the first section and fail to complete the second section within a seasonable time, they shall forfeit to the United States all right to the lands not previously patented, and the certificate of purchase shall be deemed and considered cancelled. And provided further, That in case the said company shall fail to make payment for the lands, or fail to construct the road, as hereinbefore stipulated, within a reasonable time, the surplus lands shall be disposed of by the Secretary of the Interior at public auction, in quantities not exceeding one hundred and sixty acres; but in no case for a sum less than the appraised value, the net proceeds to be applied in the same manner as hereinbefore specified. And provided further, That the said railroad company shall finally and in good faith sell and dispose of all said lands within seven years after receiving the patent therefor, except what may be necessary for railroad purposes; and in default thereof, so much thereof as may remain undisposed of shall revert to the Delaware nation, to be disposed of as is herein provided for other forfeited lands.

Do hereby accept and consent to the said amendments to the articles of agreements and convention aforesaid, and agree that the same shall be considered as a part thereof.

In testimony whereof, we have hereunto set our hands and affixed our seals, this twenty-first day of July, Anno Domini 1860. Signatures, July 21, 1860.

JOHN CONNOR, *Head Chief*, his x mark. [SEAL.]
SAR-COX-IE, *Chief of Turtle band*, his x mark. [SEAL.]
NE-CON-HE-CON, *Chief of Wolf band*, his x mark. [SEAL.]
ROCK-A-TO-WHA, *Chief of Turkey band*, his x mark. [SEAL.]
JAMES CONNOR, *Delegate*, his x mark. [SEAL.]

Witness:—

HENRY TIBLOW, *United States Interpreter*,
THOS. S. GLADDING,
SAMUEL PRIESTLEY,
WM. G. BRADSHAW.

I do hereby certify that the foregoing instrument of writing was fully explained by me to the Delaware tribe of Indians in council assembled in the day and year last above written, and that they did accept and consent to the said foregoing instrument of writing, and subscribed their names and affixed their seals thereto in my presence.

Given under my hand this twenty-first day of July, one thousand eight hundred and sixty.

THOS. B. SYKES, *U. S. Agent for the Delawares.*

Now, therefore, be it known that I, JAMES BUCHANAN, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the twenty-seventh of June, eighteen hundred and sixty, accept, ratify and confirm said treaty with the amendment as aforesaid. Ratified and proclaimed. Aug. 22, 1860.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, having signed the same with my hand.

Done at the city of Washington, this twenty-second day of August, in the year of our Lord one thousand eight hundred and sixty, and of the Independence of the United States the eighty-fifth.

[L. S.]

JAMES BUCHANAN.

By the President:

WM. HENRY TRESCOT, *Acting Secretary of State.*

Treaty between the United States of America and the Delaware Tribe of Indians; Concluded July 4, 1866; Ratification advised July 26, 1866; Proclaimed August 10, 1866.

ANDREW JOHNSON,

President of the United States of America. July 4, 1866.

To all and singular to whom these presents shall come, Greeting:

Preamble. Whereas a treaty was made and concluded at the Delaware Agency, Kansas, on the fourth day of July, in the year of our Lord one thousand eight hundred and sixty-six, by and between Thomas Murphy, John G. Pratt, and William H. Watson, Commissioners, on the part of the United States, and Captain John Connor, Captain Sarcoxie, Charles Journeycake, and other chiefs and councillors of the Delaware tribe of Indians, on the part of said tribe of Indians, and duly authorized thereto by them, which treaty is in the words and figures following, to wit:

Contracting parties. Articles of Agreement between the United States and the chiefs and councillors of the Delaware Indians, on behalf of said tribe, made at the Delaware Agency, Kansas, on the fourth day of July, eighteen hundred and sixty-six.

Preamble. Whereas Congress has by law made it the duty of the President of the United States to provide by treaty for the removal of the Indian tribes from the State of Kansas; and whereas the Delaware Indians have expressed a wish to remove from their present reservation in said State to the Indian country, located between the States of Kansas and Texas; and whereas the United States have, by treaties negotiated with the Choctaws and Chickasaws, with the Creeks, and with the Seminoles, Indian tribes residing in said Indian country, acquired the right to locate other Indian tribes within the limits of the same; and whereas the

Missouri River Railroad Company, a corporation existing in the State of Kansas by the laws thereof—and which company has built a railroad connecting with the Pacific Railroad, from near the mouth of the Kaw River to Leavenworth, in aid of which road the Delawares, by treaty in eighteen hundred and sixty-four, agreed to dispose of their lands—has expressed a desire to purchase the present Delaware Indian reservation in the said State, in a body, at a fair price:

It is hereby agreed between Thomas Murphy, superintendent of Indian affairs, John G. Pratt, agent for the Delawares, and William H. Watson, special commissioner, who are duly appointed to act for the United States; and Captain John Connor, Captain Sarcoxie, and Charles Journeycake, chiefs, and James Ketchum, James Connor, Andrew Miller, and John Sarcoxie, councillors, duly appointed and authorized by said Delaware Indians to act for them and in their behalf, to wit:

Value of reservation heretofore sold to be paid the Delawares.

Article I. That the United States shall secure and cause to be paid to said Indians the full value of all that part of their reservation, with the improvements then existing on the same, heretofore sold to the Leavenworth, Pawnee, and Western Railroad Company, according to the terms of a treaty ratified August twenty-second, eighteen hundred and sixty, and supplemental treaties, and in accordance with the conditions, restrictions, and limitations thereof.

Remainder of reservation may be sold.

Article II. That the Secretary of the Interior shall be, and he is, authorized to sell to said Missouri River Railroad Company, or to other responsible party or parties, in a body, all the remaining part of said reservation, being the lands conveyed to said Delaware Indians in pursuance of the provisions of the supplemental treaty of September twenty-fourth, eighteen hundred and twenty-nine, and all other lands owned by the said tribe in the State of Kansas not previously disposed of, except as hereinafter provided, for a price not less than two dollars and fifty cents per acre, exclusive of improvements.

Price.

Lands of those Indians electing to become citizens to be reserved from sale.

Article III. It shall be the duty of the Secretary of the Interior to give each of all the adult Delaware Indians who have received their proportion of land in severalty an opportunity, free from all restraint, to elect whether they will dissolve their relations with their tribe and become citizens of the United States; and the lands of all such Indians as may elect to become citizens, together with those of their minor children, held by them in severalty, shall be reserved from the sale hereinbefore provided for. And the Secretary of the Interior shall cause any and all improvements made on any of the said lands, the sale of which is provided for, whether held in common or in severalty, to be appraised, and the value thereof added to the price of said lands, to be paid for when payment is made for the lands upon which said improvements exist; and the money received for the improvements on the land of each Indian held in severalty shall be paid to him at any time after its payment to the Secretary of the Interior, when the department shall be notified that said Indian is ready to remove to the Indian country, to provide for his removal to, and to enable him to make improvements on his new home therein: Provided, That whenever it shall be ascertained under the registry above provided for what lands will be vacated, there shall be set apart from the lands held in common, for each child of Delaware blood, born since the allotment of land to said tribe in severalty was made under previous treaties, a quantity of land equal to the amount to which they would have been entitled had they been born before said allotment, provided that selections for children belonging to families whose head may elect to remain may be made from lands which are to be vacated by those who elect to remove: And provided further, That in case there shall be improvements upon any heretofore allotted lands, so selected for children of the Delawares, payment shall be made for such improvements, at their appraised value, by the parents or guardians of said children, at the same time as if the said lands had been sold to the railroad company or other parties.

Improvements to be appraised.

value thereof paid to each Indian.

Lands to be set apart for children born since allotment

Improvements

The United States to sell certain lands to the Delawares.

Article IV. The United States agree to sell to the said Delaware Indians a tract of land ceded to the government by the Choctaws and Chickasaws, the Creeks, or the Seminoles, or which may be ceded by the Cherokees in the Indian country, to be selected by the Delawares in one body in as compact a form as practicable, so as to contain timber, water, and agricultural lands, to contain in the aggregate, if the said Delaware Indians shall so desire, a quantity equal to one hundred and sixty (160) acres for each man, woman, and child who shall remove to said country, at the price per acre paid by the United States for the said lands, to be paid for by the Delawares out of the proceeds of sales of land in Kansas, heretofore provided for. The said tract of country shall be set off with clearly and permanently marked boundaries by the United States; and also surveyed as public lands are surveyed, when the Delaware council shall so request, when the same may, in whole or in part, be allotted by said council to each member of said tribe residing in said country, said allotment being subject to the approval of the Secretary of the Interior.

Price.

Boundaries and surveys.

Peaceable possession guaranteed.

Article V. The United States guarantee to the said Delawares peaceable possession of their new home herein provided to be selected for them in the Indian country, and protection from hostile Indians and internal strife and civil war, and a full and just participation in any general council or territorial government that may be established for the nations and tribes residing in said Indian country.

Proceeds of sales of lands to be paid to the Indians, and how.

Article VI. It is agreed that the proceeds of the sale of the Delaware lands herein provided for shall be paid to said Indians in the manner following, to wit: Whenever the Department of the Interior shall be notified by the council, through the agent, that any of the Delawares who hold land in severalty are ready to remove, at the same time describing their allotments, there shall be paid to each such person the value of his allotment, and that of his family, to enable him to remove to and improve his new home,

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provided the money for the said allotment shall have been paid to the Secretary of the Interior; and while said money, or any part thereof, shall remain in the Treasury of the United States, the Delawares shall be entitled to receive interest on the amount so retained at the rate of five (5) per cent per annum. And the residue of the proceeds of the sale of the Delaware lands, being those which have not been allotted, or which have once been allotted, but have been abandoned by the allottees, shall be added to the general fund of the Delawares, interest thereon to be paid to the Indians in the same manner as is now provided in regard to that fund.

Purchase of the lands by the Missouri River Railroad Company.

Article VII. Within thirty days after the ratification of this treaty it shall be the duty of the Secretary of the Interior to give the said Missouri River Railroad Company notice that he is authorized to contract with them or other responsible party or parties for the sale of said lands on the terms specified in this treaty, indicating the approximate quantity thereof; and within twenty days after receiving said notice at their usual place of doing business in the State of Kansas it shall be competent for said company to elect to make the purchase, by filing with the said Secretary their bond, with approved security, in double the amount proposed to be paid by them for the whole of said lands, guaranteeing that they will purchase all of the lands to be sold under the provisions of this treaty, and that they will pay for them in accordance with the terms thereof. And upon the filing of a satisfactory bond as above provided by said company, the contract for such purchase shall be concluded by the said Secretary with said Missouri River Railroad Company, at not less than two dollars and fifty cents per acre for the whole of the lands herein provided to be sold: Provided, however, That if said railroad company shall not within the twenty days above limited file its bond for the purchase as herein prescribed, the Secretary of the Interior may at the expiration of that time accept any offer for the whole of said lands in one body, at

If, &c. land may be sold to others.

not less than two dollars and fifty cents per acre, from any other responsible parties; but no offer shall be considered from other parties than said Missouri River Railroad Company, unless accompanied by a certificate of deposit in the First National Bank of the city of Washington, D. C., to the credit of the said Secretary, for an amount equal to ten per cent of the aggregate value of the land at the price proposed, to be forfeited for the use of the Delawares if the sale should be awarded to said person or corporation so proposing to purchase the lands, and said party should fail to make payment as hereinafter provided.

Payment, when to be made.

Article VIII. That within sixty days after the sale of said land shall have been effected, the purchaser shall pay to the said Secretary, in trust for the Delawares, the stipulated price of said unallotted lands, with the appraised value of improvements thereon, excepting therefrom the mill reservation, and the quarter sections upon which the council-house and blacksmith shops are built, the use of which shall be retained until the final removal of the Delawares, and for which payment shall not be required from the purchaser until possession is delivered; and from time to time thereafter, as often as the Secretary of the Interior shall notify the said purchaser that ten thousand acres or more of said lands have been vacated by said Indians, within three months thereafter, said purchaser shall pay to the Secretary of the Interior, in trust for the said Indians, the stipulated price for said lands, with the appraised value of the improvements; and so on until all are paid for, according to the true intent and meaning hereof; and as said lands shall be paid for, patents therefor, conveying the same in fee simple, shall be from time to time issued to said purchaser, or to his or its assigns, by the President of the United States.

Registry to be made of Delawares electing to become citizens.

Article IX. It is also stipulated that the Secretary of the Interior shall cause a registry to be made of the names of all of said Delawares who have elected to dissolve their tribal relations and to become citizens of the United States,

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as provided in this treaty, with the names, ages, and sex of the members of the family of each of said Delawares, and present a certified copy of the same to the judge of the district court of the United States for the district of Kansas, and cause a copy to be filed in the office of the commissioner of Indian affairs, after which any of said Delawares, being adults, may appear before the said judge in open court, and make the same proof and take the same oath of allegiance as is provided by law for the naturalization of aliens, and also make proof to the satisfaction of said court that he is sufficiently intelligent and prudent to control his own affairs and interests, that he has adopted the habits of civilized life, and has been able to support, for at least five years, himself and family; when he shall receive a certificate of the same under the seal of the said court; and on the filing of the said certificate in the office of the commissioner of Indian affairs, the said Delaware Indian shall be constituted a citizen of the United States, and be entitled to receive a patent in fee simple, with power of alienation, for the land heretofore allotted to him, and his just proportion, in cash or in bonds, of the cash value of the credits of said tribe, principal and interest, then held in trust by the United States; and also, as the same may be received, his proportion of the proceeds of the sale of lands under the provisions of this treaty, when he shall cease to be a member of said tribe. Whereupon all of the minor children of those who have become citizens shall be construed to have elected to sever their connection with said tribe for the time being, and be entitled to their just proportion of the annuities of the tribe, to be paid to the head of the family to be expended for their support and education until they shall attain the age of twenty-one years, after which each shall elect to remove to his tribe or to become a citizen of the United States, as hereinbefore provided, and if thus admitted to citizenship, shall be entitled to all the privileges and interests herein provided for the head of the family. Should any minor as aforesaid, arriv-

Mode of procedure to become citizens.

Patent of land before allotted.

Proportion of proceeds of sales.

Minor children.

ing at the age of twenty-one years, and electing to become a citizen of the United States, or any adult Indian having so elected, fail to be admitted, he shall not be compelled to remove, but the Secretary of the Interior shall provide proper guardianship for the protection of his rights and interests and those of his family. There shall be granted to each of the Delawares who have thus become citizens, a patent in fee simple for the lands heretofore allotted to them, and, if they do not remove with the nation, their pro rata share of all annuities and trust property held by the United States for them, the division to be made under the direction of the President of the United States, after which such persons shall cease to be members of the Delaware tribe, and shall not further participate in their councils, nor share in their property or annuities.

Grant to those that have become citizens.

Article X. It is further agreed that the funds of the Delawares shall never be applied by the government to the payment of the debt or debts of any individual member or members of the nation; nor shall any person be licensed to trade with the Delawares without the consent of the chiefs and council; and the salaries of the chiefs shall henceforward be four hundred dollars per annum.

Funds of the tribe not to be used to pay debts of individual members.

Licenses to trade.

Salaries of chiefs.

Article XI. The Delawares acknowledge their dependence upon the United States, and again renew their pledges of devotion to the government thereof, and ask its protection; and the United States agree to protect, preserve, and defend them in all their just rights.

Dependence and protection.

Article XII. It is also agreed that if the said Secretary should not be able to sell the said lands as hereinbefore provided, he may cause the same to be appraised, in separate tracts, at their fair cash value, no tract to be valued at less than two dollars and fifty cents per acre, and the same when appraised may be sold at not less than the appraised value, and for as much more as the same will bring, and the money arising from the sale to be applied and distributed as hereinbefore provided.

Sale of lands.

Right of way for railroads.

Article XIII. It is agreed by the Delawares that railroad companies engaged in building roads whose routes shall lie through their new reservation in the Indian country shall have a right of way through and over said lands, not exceeding two hundred feet in width for any such road, and also the right to enter on all lands and take and use such gravel, stone, and other material except timber as may be necessary for the construction of such roads, compensation to be made for any damages done in obtaining such material, and for any damages arising from the location or running of such roads to improvements which shall have been made before such road shall have been located, such damages to be ascertained under regulations to be prescribed by the Secretary of the Interior.

Settlement of all claims of the Delawares for depredations.

Article XIV. The United States further agree that, in accordance with the general provisions of the sixth article of the Delaware treaty of May thirty, eighteen hundred and sixty, which have not yet been fulfilled, there shall be credited to the Delawares, in the purchase of their new reservation in the Indian country, the sum of thirty thousand dollars, which credit by the United States shall be received by the Delawares as a full settlement of all claims against the government for depredations upon timber to the date of the signing of this treaty; and the Delawares shall receive, without cost, from the United States, land included within their new reservation to the amount of twenty-three sections, in place of the twenty-three sections of half-breed Kaw lands referred to in said sixth section of the treaty of eighteen hundred and sixty; and inasmuch as the Delawares claim that a large amount of stock has been stolen from them by whites since the treaty of eighteen hundred and fifty-four, the United States agree to have a careful examination of such claims made under the direction of the Secretary of the Interior, and when the value of such stolen stock shall have been ascertained, the same shall be reported to Congress with a recommendation for an appropriation to pay for the same; and all moneys appro-

priated for such purpose shall be paid to the owners of said stock.

Delawares not to move until new homes are provided.

Article XV. It is also agreed by the contracting parties that nothing contained in this treaty shall be so construed as to require the Delawares to remove from their present homes, until after they shall have selected and received title to lands for new homes elsewhere.

Execution.

In testimony whereof, the said superintendent, agent, and special commissioner, on behalf of the United States, and the said chiefs and councillors on behalf of the Delawares, have hereunto set their hands and seals this fourth day of July, one thousand eight hundred and sixty-six.

THOS. MURPHY, [SEAL.]
Superintendent.

JOHN G. PRATT, [SEAL.]
Agent.

W. H. WATSON, [SEAL.]
Special Commissioner.

JOHN CONNOR, his x mark, [SEAL.]
Head Chief.

CAPT. SARCOXIE, his x mark, [SEAL.]
Assistant Chief.

CHARLES JOURNEYCAKE, [SEAL.]
Assistant Chief.

JAMES KETCH[U]M, [SEAL.]

JAMES CONNOR, his x mark, [SEAL.]

ANDREW MILLER, his x mark, [SEAL.]

JOHN SARCOXIE, his x mark, [SEAL.]
Councillors.

ISAAC JOHNYCAKE,
U. S. Interpreter.

In presence of—

HENRY S. BULKLEY.
EDWARD S. MENAGER.
LOUIS A. MENAGER.

Ratification.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the twenty-sixth day of July, one thousand eight hundred and sixty-six, advise and consent to the ratification of the same, by a resolution in the words and figures following, to wit:

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,
July 26, 1866.

Resolved, (two thirds of the Senators present concurring,) That the Senate advise and consent to the ratification of the articles of agreement between the United States and Delaware Indians, made at the Delaware Agency, Kansas, on the fourth day of July, one thousand eight hundred and sixty-six.

Attest:

J. W. FORNEY, *Secretary*.

Proclaimed.

Now, therefore, be it known that I, ANDREW JOHNSON, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in its resolution of the twenty-sixth of July, one thousand eight hundred and sixty-six, accept, ratify, and confirm the said treaty.

In testimony whereof, I have hereto signed my name and caused the seal of the United States to be affixed.

Done at the city of Washington this tenth day of August, in the year of our Lord one thousand eight hundred and sixty-six, and of the Independence of the United States of America the ninety-first.

[SEAL.]

ANDREW JOHNSON.

By the President:

HENRY STANBERY, *Acting Secretary of State*.

Treaty between the United States of America and the Cherokee Nation of Indians; Concluded July 19, 1866; *Ratification advised, with Amendments, July* 27, 1866; *Amendments accepted July* 31, 1866; *Proclaimed August* 11, 1866.

ANDREW JOHNSON,

July 19, 1866. **President of the United States of America.**

To all and singular to whom these presents shall come, Greeting:

Preamble. Whereas a Treaty was made and concluded at the city of Washington, in the District of Columbia, on the nineteenth day of July, in the year of our Lord one thousand eight hundred and sixty-six, by and between Dennis N. Cooley and Elijah Sells, Commissioners, on the part of the United States, and Smith Christie, White Catcher, James McDaniel, S. H. Benge, Daniel H. Ross, and J. B. Jones, delegates of the Cherokee nation, appointed by resolution of the national council, on the part of said Cherokee nation, which treaty is in the words and figures following, to wit:

Contracting parties. Articles of Agreement and Convention at the City of Washington on the nineteenth day of July, in the year of our Lord one thousand eight hundred and sixty-six, between the United States, represented by Dennis N. Cooley, Commissioner of Indian affairs, [and] Elijah Sells, superintendent of Indian affairs for the southern superintendency, and the Cherokee nation of Indians, represented by its delegates, James McDaniel, Smith Christie, White Catcher, S. H. Benge, J. B. Jones, and Daniel H. Ross—John Ross, principal chief of the Cherokees, being too unwell to join in these negotiations.

PREAMBLE.

Whereas existing treaties between the United States and the Cherokee nation are deemed to be insufficient, the said contracting parties agree as follows, viz:

Pretended treaty declared void.

Article I. The pretended treaty made with the so-called confederate states by the Cherokee nation on the seventh day of October, eighteen hundred and sixty-one, and repudiated by the national council of the Cherokee nation on the eighteenth day of February, eighteen hundred and sixty-three, is hereby declared to be void.

Amnesty.

Article II. Amnesty is hereby declared by the United States and the Cherokee nation for all crimes and misdemeanors committed by one Cherokee on the person or property of another Cherokee, or of a citizen of the United States, prior to the fourth day of July, eighteen hundred and sixty-six; and no right of action arising out of wrongs committed in aid or in the suppression of the rebellion shall be prosecuted or maintained in the courts of the United States or in the courts of the Cherokee nation.

Amendment. *Post* p. 807.

Confiscation laws repealed and former owners restored to their rights.

Article III. The confiscation laws of the Cherokee nation shall be repealed, and the same, and all sales of farms, and improvements on real estate, made or pretended to be made in pursuance thereof, are hereby agreed and declared to be null and void, and the former owners of such property so sold, their heirs or assigns, shall have the right peaceably to reoccupy their homes, and the purchaser under the confiscation laws, or his heirs or assigns, shall be repaid by the treasurer of the Cherokee nation from the national funds, the money paid for said property, and the cost of permanent improvements on such real estate, made thereon since the confiscation sale; the cost of such improvements to be fixed by a commission, to be composed of one person designated by the Secretary of the Interior and one by the principal chief of the nation, which two may appoint a third in cases of disagreement, which cost so fixed shall be refunded to the national treasurer by the returning Cherokees within three years from the ratification hereof.

Improvements

Cherokees, freed persons, and free negroes may elect to reside where.

Article IV. All the Cherokees and freed persons who were formerly slaves to any Cherokee, and all free negroes not having been such slaves, who resided in the Cherokee nation prior to June first, eighteen hundred and sixty-one, who may within two years elect not to reside northeast of the Arkansas river and southeast of Grand river, shall have the right to settle in and occupy the Canadian district southwest of the Arkansas river, and also all that tract of country lying northwest of Grand river, and bounded on the southeast by Grand river and west by the Creek reservation to the northeast corner thereof; from thence west on the north line of the Creek reservation to the ninety-sixth degree of west longitude; and thence north on said line of longitude so far that a line due east to Grand river will include a quantity of land equal to one hundred and sixty acres for each person who may so elect to reside in the territory above described in this article:

Proviso.

Provided, That that part of said district north of the Arkansas river shall not be set apart until it shall be found that the Canadian district is not sufficiently large to allow one hundred and sixty acres to each person desiring to obtain settlement under the provisions of this article.

Those so electing to reside there may elect local officers, judges, &c.

Article V. The inhabitants electing to reside in the district described in the preceding article shall have the right to elect all their local officers and judges, and the number of delegates to which by their numbers they may be entitled in any general council to be established in the Indian territory under the provisions of this treaty, as stated in Article XII.; and to control all their local affairs, and to establish all necessary police regulations and rules for the administration of justice in said district, not inconsistent with the constitution of the Cherokee nation or the laws

Proviso.

of the United States; Provided, The Cherokees residing in said district shall enjoy all the rights and privileges of other Cherokees who may elect to settle in said district as hereinbefore provided, and shall hold the same rights and privileges and be subject to the same liabilities as those

who elect to settle in said district under the provisions of this treaty; Provided also, That if any such police regulations or rules be adopted which, in the opinion of the President, bear oppressively on any citizen of the nation, he may suspend the same. And all rules or regulations in said district, or in any other district of the nation, discriminating against the citizens of other districts, are prohibited, and shall be void. Proviso.

Article VI. The inhabitants of the said district hereinbefore described shall be entitled to representation according to numbers in the national council, and all laws of the Cherokee nation shall be uniform throughout said nation. And should any such law, either in its provisions or in the manner of its enforcement, in the opinion of the President of the United States, operate unjustly or injuriously in said district, he is hereby authorized and empowered to correct such evil, and to adopt the means necessary to secure the impartial administration of justice, as well as a fair and equitable application and expenditure of the national funds as between the people of this and of every other district in said nation. Representation in national council. Unequal laws.

Article VII. The United States court to be created in the Indian territory; and until such court is created therein, the United States district court, the nearest to the Cherokee nation, shall have exclusive original jurisdiction of all causes, civil and criminal, wherein an inhabitant of the district hereinbefore described shall be a party, and where an inhabitant outside of said district, in the Cherokee nation, shall be the other party, as plaintiff or defendant in a civil cause, or shall be defendant or prosecutor in a criminal case, and all process issued in said district by any officer of the Cherokee nation, to be executed on an inhabitant residing outside of said district, and all process issued by any officer of the Cherokee nation outside of said district, to be executed on an inhabitant residing in said district, shall be to all intents and purposes null and void, unless indorsed by the district judge for the district where Courts. Process.

such process is to be served, and said person, so arrested, shall be held in custody by the officer so arresting him, until he shall be delivered over to the United States marshal, or consent to be tried by the Cherokee court: Provided, That any or all the provisions of this treaty, which make any distinction in rights and remedies between the citizens of any district and the citizens of the rest of the nation, shall be abrogated whenever the President shall have ascertained, by an election duly ordered by him, that a majority of the voters of such district desire them to be abrogated, and he shall have declared such abrogation: And provided further, That no law or regulation, to be hereafter enacted within said Cherokee nation or any district thereof, prescribing a penalty for its violation, shall take effect or be enforced until after ninety days from the date of its promulgation, either by publication in one or more newspapers of general circulation in said Cherokee nation, or by posting up copies thereof in the Cherokee and English languages in each district where the same is to take effect, at the usual place of holding district courts.

Proviso.

Proviso.

Licenses to trade not to be granted unless &c.

Article VIII. No license to trade in goods, wares, or merchandise *merchandise* shall be granted by the United States to trade in the Cherokee nation, unless approved by the Cherokee national council, except in the Canadian district, and such other district north of Arkansas river and west of Grand river occupied by the so-called southern Cherokees, as provided in Article IV. of this treaty.

Slavery, &c. not to exist.

Article IX. The Cherokee nation having, voluntarily, in February, eighteen hundred and sixty-three, by an act of their national council, forever abolished slavery, hereby covenant and agree that never hereafter shall either slavery or involuntary servitude exist in their nation otherwise than in the punishment of crime, whereof the party shall have been duly convicted, in accordance with laws applicable to all the members of said tribe alike. They further agree that all freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the com-

Freedmen.

mencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees: Provided, That owners of slaves so emancipated in the Cherokee nation shall never receive any compensation or pay for the slaves so emancipated.

No pay for emancipated slaves.

Article X. Every Cherokee and freed person resident in the Cherokee nation shall have the right to sell any products of his farm, including his or her live stock, or any merchandise or manufactured products, and to ship and drive the same to market without restraint, paying any tax thereon which is now or may be levied by the United States on the quantity sold outside of the Indian territory.

Farm products may be sold, &c.

Article XI. The Cherokee nation hereby grant a right of way not exceeding two hundred feet wide, except at stations, switches, water stations, or crossing of rivers, where more may be indispensable to the full enjoyment of the franchise herein granted, and then only two hundred additional feet shall be taken, and only for such length as may be absolutely necessary, through all their lands, to any company or corporation which shall be duly authorized by Congress to construct a railroad from any point north to any point south, and from any point east to any point west of, and which may pass through, the Cherokee nation. Said company or corporation, and their employes and laborers, while constructing and repairing the same, and in operating said road or roads, including all necessary agents on the line, at stations, switches, water tanks, and all others necessary to the successful operation of a railroad, shall be protected in the discharge of their duties, and at all times subject to the Indian intercourse laws, now or which may hereafter be enacted and be in force in the Cherokee nation.

Right of way for railroads.

Article XII. The Cherokees agree that a general council, consisting of delegates elected by each nation or tribe lawfully residing within the Indian territory, may be annually convened in said territory, which council shall be organiz-

General council.

ed in such manner and possess such powers as hereinafter prescribed.

Census.

First. After the ratification of this treaty, and as soon as may be deemed practicable by the Secretary of the Interior, and prior to the first session of said council, a census or enumeration of each tribe lawfully resident in said territory shall be taken under the direction of the commissioner of Indian affairs, who for that purpose is hereby authorized to designate and appoint competent persons, whose compensation shall be fixed by the Secretary of the Interior, and paid by the United States.

First general council, how composed.

Second. The first general council shall consist of one member from each tribe, and an additional member for each one thousand Indians, or each fraction of a thousand greater than five hundred, being members of any tribe lawfully resident in said territory, and shall be selected by said tribes respectively, who may assent to the establishment of said general council; and if none should be thus formally selected by any nation or tribe so assenting, the said nation or tribe shall be represented in said general council by the chief or chiefs and headmen of said tribes, to be taken in the order of their rank as recognized in tribal usage, in the same number and proportion as above indicated. After the said census shall have been taken and completed, the superintendent of Indian affairs shall publish and declare to each tribe assenting to the establishment of such council the number of members of such council to which they shall be entitled under the provisions of this article, and the persons entitled to represent said tribes shall meet at such time and place as he shall approve; but thereafter the time and place of the sessions of said council shall be determined by its action: Provided, That no session in any one year shall exceed the term of thirty days: And provided, That special sessions of said council may be called by the Secretary of the Interior whenever in his judgment the interest of said tribes shall require such special session.

Time and place of first meeting.

Sessions not to exceed 30 days.

Special sessions.

Powers of general council

Third. Said general council shall have power to legislate upon matters pertaining to the intercourse and relations of the Indian tribes and nations and colonies of freedmen resident in said territory; the arrest and extradition of criminals and offenders escaping from one tribe to another, or into any community of freedmen; the administration of justice between members of different tribes of said territory and persons other than Indians and members of said tribes or nations; and the common defence and safety of the nations of said territory.

Laws, when to take effect.

All laws enacted by such council shall take effect at such time as may therein be provided, unless suspended by direction of the President of the United States. No law shall be enacted inconsistent with the Constitution of the United States, or laws of Congress, or existing treaty stipulations with the United States. Nor shall said council legislate upon matters other than those above indicated: Provided, however, That the legislative power of such general council may be enlarged by the consent of the national council of each nation or tribe assenting to its establishment, with the approval of the President of the United States.

Legislative power may be enlarged.

President of council.

Fourth. Said council shall be presided over by such person as may be designated by the Secretary of the Interior.

Secretary of council.

Fifth. The council shall elect a secretary, whose duty it shall be to keep an accurate record of all the proceedings of said council, and who shall transmit a true copy of all such proceedings, duly certified by the presiding officer of such council, to the Secretary of the Interior, and to each tribe or nation represented in said council, immediately after the sessions of said council shall terminate. He shall be paid out of the treasury of the United States an annual salary of five hundred dollars.

Pay.

Pay of members of council.

Sixth. The members of said council shall be paid by the United States the sum of four dollars per diem during the

term actually in attendance on the sessions of said council, and at the rate of four dollars for every twenty miles necessarily traveled by them in going from and returning to their homes, respectively, from said council, to be certified by the secretary and president of the said council.

Courts.

Article XIII. The Cherokees also agree that a court or courts may be established by the United States in said territory, with such jurisdiction and organized in such manner as may be prescribed by law: Provided, That the judicial tribunals of the nation shall be allowed to retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the nation, by nativity or adoption, shall be the only parties, or where the cause of action shall arise in the Cherokee nation, except as otherwise provided in this treaty.

Lands for missionary or educational purposes;

Article XIV. The right to the use and occupancy of a quantity of land not exceeding one hundred and sixty acres, to be selected according to legal subdivisions in one body, and to include their improvements, and not including the improvements of any member of the Cherokee nation, is hereby granted to every society or denomination which has erected, or which with the consent of the national council may hereafter erect, buildings within the Cherokee country for missionary or educational purposes. But no land thus granted, nor buildings which have been or may be erected thereon, shall ever be sold or [o]therwise disposed of except with the consent and approval of the Cherokee national council and of the Secretary of the Interior. And whenever any such lands or buildings shall be sold or disposed of, the proceeds thereof shall be applied by said society or societies for like purposes within said nation, subject to the approval of the Secretary of the Interior.

not to be sold, except, &c.;

proceeds of sale.

The United States may settle civilized Indians in the Cherokee country.

Article XV. The United States may settle any civilized Indians, friendly with the Cherokees and adjacent tribes, within the Cherokee country, on unoccupied lands east of 96 degrees, on such terms as may be agreed upon by any

such tribe and the Cherokees, subject to the approval of the President of the United States, which shall be consistent with the following provisions, viz: Should any such tribe or band of Indians settling in said country abandon their tribal organization, there being first paid into the Cherokee national fund a sum of money which shall sustain the same proportion to the then existing national fund that the number of Indians sustain to the whole number of Cherokees then residing in the Cherokee country, they shall be incorporated into and ever after remain a part of the Cherokee nation, on equal terms in every respect with native citizens. And should any such tribe, thus settling in said country, decide to preserve their tribal organizations, and to maintain their tribal laws, customs, and usages, not inconsistent with the constitution and laws of the Cherokee nation, they shall have a district of country set off for their use by metes and bounds equal to one hundred and sixty acres, if they should so decide, for each man, woman, and child of said tribe, and shall pay for the same into the national fund such price as may be agreed on by them and the Cherokee nation, subject to the approval of the President of the United States, and in cases of disagreement the price to be fixed by the President.

How may be made part of Cherokee nation.

Those wishing to preserve tribal organization, to have land set off to them;

And the said tribe thus settled shall also pay into the national fund a sum of money, to be agreed on by the respective parties, not greater in proportion to the whole existing national fund and the probable proceeds of the lands herein ceded or authorized to be ceded or sold than their numbers bear to the whole number of Cherokees then residing in said country, and thence afterwards they shall enjoy all the rights of native Cherokees. But no Indians who have no tribal organizations, or who shall determine to abandon their tribal organizations, shall be permitted to settle east of the 96th degree of longitude without the consent of the Cherokee national council, or of a delegation duly appointed by it, being first obtained. And no Indians who have and determine to preserve their tribal or-

to pay sum into national fund.

Limits of places of settlement.

ganizations shall be permitted to settle, as herein provided, east of the 96th degree of longitude without such consent being first obtained, unless the President of the United States, after a full hearing of the objections offered by said council or delegation to such settlement, shall determine that the objections are insufficient, in which case he may authorize the settlement of such tribe east of the 96th degree of longitude.

Where the United States may settle friendly Indians.

Article XVI. The United States may settle friendly Indians in any part of the Cherokee country west of 96th degree, to be taken in a compact form in quantity not exceeding one hundred and sixty acres for each member of each of said tribes thus to be settled; the boundaries of each of said districts to be distinctly marked, and the land conveyed in fee simple to each of said tribes to be held in common or by their members in severalty as the United States may decide.

Lands.

Said lands thus disposed of to be paid for to the Cherokee nation at such price as may be agreed on between the said parties in interest subject to the approval of the President; and if they should not agree, then the price to be fixed by the President.

Possession and jurisdiction over such lands.

The Cherokee nation to retain the right of possession of and jurisdiction over all of said country west of 96th degrees of longitude until thus sold and occupied, after which their jurisdiction and right of possession to terminate forever as to each of said districts thus sold and occupied.

Cession of lands to the United States in trust.

Article XVII. The Cherokee nation hereby cedes, in trust to the United States, the tract of land in the State of Kansas which was sold to the Cherokees by the United States, under the provisions of the second article of the treaty of 1835; and also that strip of the land ceded to the nation by the fourth article of said treaty which is included in the State of Kansas, and the Cherokees consent that said lands may be included in the limits and jurisdiction of the said State.

The lands herein ceded shall be surveyed as the public lands of the United States are surveyed, under the direction of the commissioner of the general land office, and shall be appraised by two disinterested persons, one to be designated by the Cherokee national council and one by the Secretary of the Interior, and, in case of disagreement, by a third person, to be mutually selected by the aforesaid appraisers. The appraisement to be not less than an average of one dollar and a quarter per acre, exclusive of improvements.

Lands to be surveyed and appraised;

And the Secretary of the Interior shall from time to time as such surveys and appraisements are approved by him, after due advertisements for sealed bids, sell such lands to the highest bidders for cash in parcels not exceeding one hundred and sixty acres, and at not less than the appraised value: Provided, That whenever there are improvements of the value of fifty dollars made on the lands not being mineral, and owned and personally occupied by any person for agricultural purposes at the date of the signing hereof, such person so owning, and in person residing on such improvements, shall, after due proof, made under such regulations as the Secretary of the Interior may prescribe, be entitled to buy, at the appraised value, the smallest quantity of land in legal subdivisions which will include his improvements, not exceeding in the aggregate one hundred and sixty acres; the expenses of survey and appraisement to be paid by the Secretary out of the proceeds of sale of said land: Provided, That nothing in this article shall prevent the Secretary of the Interior from selling the whole of said neutral lands in a body to any responsible party, for cash, for a sum not less than eight hundred thousand dollars.

may be sold to highest bidder.

Improvements

Proviso.

Amendment. *Post*, p. 807.

Article XVIII. That any lands owned by the Cherokees in the State of Arkansas and in States east of the Mississippi may be sold by the Cherokee nation in such manner as their national council may prescribe, all such sales being first approved by the Secretary of the Interior.

Sales by Cherokees of lands in Arkansas

Heads of families.

Article XIX. All Cherokees being heads of families residing at the date of the ratification of this treaty on any of the lands herein ceded, or authorized to be sold, and desiring to remove to the reserved country, shall be paid by the purchasers of said lands the value of such improvements, to be ascertained and appraised by the commissioners who appraise the lands, subject to the approval of the Secretary of the Interior; and if he shall elect to remain on the land now occupied by him, shall be entitled to receive a patent from the United States in fee simple for three hundred and twenty acres of land to include his improvements, and thereupon he and his family shall cease to be members of the nation.

Lands reserved to be surveyed and allotted.

Article XX. Whenever the Cherokee national council shall request it, the Secretary of the Interior shall cause the country reserved for the Cherokees to be surveyed and allotted among them, at the expense of the United States.

Boundary line to be run and marked.

Article XXI. It being difficult to learn the precise boundary line between the Cherokee country and the States of Arkansas, Missouri, and Kansas, it is agreed that the United States shall, at its own expense, cause the same to be run as far west as the Arkansas, and marked by permanent and conspicuous monuments, by two commissioners, one of whom shall be designated by the Cherokee national council.

Agent of Cherokees to examine accounts, books, &c.

Article XXII. The Cherokee national council, or any duly appointed delegation thereof, shall have the privilege to appoint an agent to examine the accounts of the nation with the government of the United States at such time as they may see proper, and to continue or discharge such agent, and to appoint another, as may be thought best by such council or delegation; and such agent shall have free access to all accounts and books in the executive departments relating to the business of said Cherokee nation, and an opportunity to examine the same in the presence of the officer having such books and papers in charge.

Article XXIII. All funds now due the nation, or that may hereafter accrue from the sale of their lands by the United States as hereinbefore provided for, shall be invested in United States registered stocks at their current value, and the interest on all said funds shall be paid semi-annually on the order of the Cherokee nation, and shall be applied to the following purposes, to wit: Thirty-five per cent shall be applied for the support of the common schools of the nation and educational purposes; fifteen per cent for the orphan fund, and fifty per cent for general purposes, including reasonable salaries of district officers; and the Secretary of the Interior, with the approval of the President of the United States, may pay out of the funds due the nation, on the order of the national council or a delegation duly authorized by it, such amount as he may deem necessary to meet outstanding obligations of the Cherokee nation, caused by the suspension of the payment of their annuities, not to exceed the sum of one hundred and fifty thousand dollars.

Funds, how to be invested.

Interest, how to be paid.

Article XXIV. As a slight testimony for the useful and arduous services of the Rev. Evan Jones, for forty years a missionary in the Cherokee nation, now a cripple, old and poor, it is agreed that the sum of three thousand dollars be paid to him, under the direction of the Secretary of the Interior, out of any Cherokee fund in or to come into his hands not otherwise appropriated.

Payment to Rev. Evan Jones.

Article XXV. A large number of the Cherokees who served in the army of the United States having died, leaving no heirs entitled to receive bounties and arrears of pay on account of such service, it is agreed that all bounties and arrears for service in the regiments of Indian United States volunteers which shall remain unclaimed by any person legally entitled to receive the same for two years from the ratification of this treaty, shall be paid as the national council may direct, to be applied to the foundation and support of an asylum for the education of orphan children, which asylum shall be under the control of the

Bounties and arrears for services as Indian volunteers, how to be paid.

national council, or of such benevolent society as said council may designate, subject to the approval of the Secretary of the Interior.

Possession and protection guaranties.

Article XXVI. The United States guarantee to the people of the Cherokee nation the quiet and peaceable possession of their country and protection against domestic feuds and insurrections and against hostilities of other tribes. They shall also be protected against inter[r]uptions or intrusion from all unauthorized citizens of the United States who may attempt to settle on their lands or reside in their territory. In case of hostilities among the Indian tribes, the United States agree that the party or parties commencing the same shall, so far as practicable, make reparation for the damages done.

Military posts in Cherokee Nation.

Article XXVII. The United States shall have the right to establish one or more military posts or stations in the Cherokee nation, as may be deemed necessary for the proper protection of the citizens of the United States lawfully residing therein and the Cherokees and other citizens of the Indian country. But no sutler or other person connected therewith, either in or out of the military organization, shall be permitted to introduce any spirit[u]ous, vinous, or malt liquors into the Cherokee nation, except the medical department proper, and by them only for strictly medical purposes. And all persons not in the military service of the United States, not citizens of the Cherokee nation, are to be prohibited from coming into the Cherokee nation, or remaining in the same, except as herein otherwise provided; and it is the duty of the United States Indian agent for the Cherokees to have such persons, not lawfully residing or sojourning therein, removed from the nation, as they now are, or hereafter may be, required by the Indian intercourse laws of the United States.

Spirituous, &c., liquors forbidden, except, &c.

Certain persons prohibited from coming into the nation.

Payment for certain provisions and clothing.

Article XXVIII. The United States hereby agree to pay for provisions and clothing furnished the army under Appotholehala in the winter of 1861 and 1862, not to exceed the sum of ten thousand dollars, the accounts to be ascertained and settled by the Secretary of the Interior.

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Expenses of Cherokee delegations.

Article XXIX. The sum of ten thousand [dollars,] or so much thereof as may be necessary to pay the expenses of the delegates and representatives of the Cherokees invited by the government to visit Washington for the purposes of making this treaty, shall be paid by the United States on the ratification of this treaty.

Amendment. *Post*, p. 807.

Payment of certain losses by missionaries, &c.

Article XXX. The United States agree to pay to the proper claimants all losses of property by missionaries or missionary societies, resulting from their being ordered or driven from the country by United States agents, and from their property being taken and occupied or destroyed by *by* United States troops, not exceeding in the aggregate twenty thousand dollars, to be ascertained by the Secretary of the Interior.

Inconsistent treaty provisions annulled.

Article XXXI. All provisions of treaties, heretofore ratified and in force, and not inconsistent with the provisions of this treaty, are hereby reaffirmed and declared to be in full force; and nothing herein shall be construed as an acknowledgment by the United States, or as a relinquishment by the Cherokee nation of any claims or demands under the guaranties of former treaties, except as herein expressly provided.

Execution

In testimony whereof, the said commissioners on the part of the United States, and the said delegation on the part of the Cherokee nation, have hereunto set their hands and seals, at the city of Washington, this *ninth* [nineteenth] day of July, A. D. one thousand eight hundred and sixty-six.

D. N. COOLEY, *Com'r Ind. Affairs.*
ELIJAH SELLS, *Sup't Ind. Affs.*
SMITH CHRISTIE,
WHITE CATCHER,
JAMES McDANIEL,
S. H. BENGE,
DANL. H. ROSS,
J. B. JONES.
Delegates of the Cherokee Nation, appointed by Resolution of the National Council.

In presence of—
W. H. WATSON,
J. W. WRIGHT.

Signatures witnessed by the following-named persons, the following interlineations being made before signing: On page 1st the word "the" interlined, on page 11 the word "the" struck out, and to said page 11 a sheet attached requiring publication of laws; and on page 34th the word "ceded" struck out and the words "neutral lands" inserted. Page 47½ added relating to expenses of treaty.

THOMAS EWING, JR.,
WM. A. PHILLIPS,
J. W. WRIGHT.

Ratification with amendments.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the twenty-seventh day of July, one thousand eight hundred and sixty-six, advise and consent to the ratification of the same, with amendments, by a resolution in the words and figures following, to wit:

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES.
July 27, 1866.

Resolved, (two-thirds of the senators present concurring,) That the Senate advise and consent to the ratification of the articles of agreement and convention made at the city of Washington, on the nineteenth day of July, in the year of our Lord one thousand eight hundred and sixty-six, between the United States and the Cherokee nation of Indians, with the following

AMENDMENTS:

Ante, p. 799.

1st. Insert at the end of Article II. the following:

But the Cherokee nation stipulate and agree to deliver up to the United States, or their duly authorized agent, any or all public property, particularly ordnance, ordnance stores, arms of all kinds, and quartermasters' stores, in their possession or control, which belonged to the United States or the so-called confederate states, without any reservation.

2d. Strike out the last proviso in Article XVII, and insert in lieu thereof the following: *Ante*, p. 805.

Provided, That nothing in this article shall prevent the Secretary of the Interior from selling the whole of said lands not occupied by actual settlers at the date of the ratification of this treaty, not exceeding one hundred and sixty acres to each person entitled to pre-emption under the pre-emption laws of the United States, in a body, to any responsible party, for cash, for a sum not less than one dollar per acre.

3d. Insert at the end of Article XXIX. the following: *Ante*, p. 806.

And the Secretary of the Interior shall also be authorized to pay the reasonable costs and expenses of the delegates of the southern Cherokees.

The moneys to be paid under this article shall be paid out of the proceeds of the sales of the national lands in Kansas.

Attest:

J. W. FORNEY, *Secretary.*

Amendments assented to.

And whereas the foregoing amendments having been fully explained and interpreted to the aforenamed delegates of the Cherokee nation, they did, on the thirty-first day of July, one thousand eight hundred and sixty-six, give, on behalf of said nation, their free and voluntary assent to said amendments, in the words and figures following, to wit:

Whereas the Senate of the United States did, on the twenty-seventh day of July, eighteen hundred and sixty-six, advise and consent to the ratification of the articles of agreement and convention, made at the city of Washington, on the nineteenth day of July, in the year of our Lord one thousand eight hundred and sixty-six, between the United States and the Cherokee nation of Indians, with the following

AMENDMENTS, to wit:

1st. Insert at the end of Article II. the following:

But the Cherokee nation stipulate and agree to deliver up to the United States, or their duly authorized agent, any or all public property, particularly ordnance, ordnance stores, arms of all kinds, and quartermasters' stores, in their possession or control, which belonged to the United States or the so-called confederate states, without any reservation.

3d. Strike out the last proviso in Article XVII, and insert in lieu thereof the following:

Provided, That nothing in this article shall prevent the Secretary of the Interior from selling the whole of said lands not occupied by actual settlers at the date of the ratification of this treaty, not exceeding one hundred and sixty acres to each person entitled to pre-emption under the pre-emption laws of the United States, in a body, to any responsible party, for cash, for a sum not less than one dollar per acre.

3d. Insert at the end of Article XXIX. the following:

And the Secretary of the Interior shall also be authorized to pay the reasonable costs and expenses of the delegates of the southern Cherokees.

The moneys to be paid under this article shall be paid out of the proceeds of the sales of the national lands in Kansas.

Now, therefore, we, the delegates on the part of the said Cherokee nation, do hereby assent and agree to the said amendments above written, the same having been explained to us and being fully understood by us.

Witness our hands and seals, this thirty-first day of July, A. D. eighteen hundred and sixty-six, at Washington, D. C.

SMITH CHRISTIE.	[SEAL.]
WHITE CATCHER.	[SEAL.]
JAMES McDANIEL.	[SEAL.]
S. H. BENGE.	[SEAL.]
DANL. H. ROSS.	[SEAL.]
J. B. JONES.	[SEAL.]

In presence of—

D. N. COOLEY, *Com'r Ind. Affairs.*
J. HARLAN, *U. S. Ind. Agent.*
CHARLES E. MIX,
J. W. WRIGHT,
W. R. IRWIN.

Proclaimed.

Now, therefore, be it known that I, ANDREW JOHNSON, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in its resolution of the twenty-seventh of July, one thousand eight hundred and sixty-six, accept, ratify, and confirm the said treaty with the amendments as aforesaid.

In testimony whereof I have signed my name hereto, and have caused the seal of the United States to be affixed.

Done at the city of Washington, this eleventh day of August, in the year of our Lord one thousand eight hundred and sixty-six and of the Independence of the United States of America the ninety-first.

[SEAL.]

ANDREW JOHNSON.

By the President:

HENRY STANBERY, *Acting Secretary of State.*